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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1511

ALAN D. MILLER, M.D., individually and as Commissioner of the New York State Department of Mental Hygiene and LAWRENCE P. ROBERTS, M.D., individually and as Director of Harlem Valley State Hospital,

Petitioners,

against

RITA HOOPER DALE, a former incompetent person,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, the State Commissioner of Mental Hygiene and the Director of Harlem Valley State Hospital, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the case of *Dale* v. *Hahn, et al.*, which affirmed a judgment of the United States District Court for the Southern District of New York. After entry of the judgment on September 24, 1973, a petition for rehearing was granted by order dated November 21, 1973. By order dated January 9, 1974, upon rehearing, the Circuit Court adhered to its original determination. By order dated February 11, 1974, the Circuit Court denied a motion to stay the mandate.

Citations to Opinions Below

The opinion of the District Court (not reported), ordered returned to her by petitioners the sum of $2,152.35 plus interest. The decision, memorandum and order are reproduced as Appendix "A" to this petition. The opinion of the Second Circuit, dated September 24, 1973, reported at 486 F. 2d 76 is reproduced as Appendix "B" to this petition. The order of the Second Circuit dated November 21, 1973, granting defendants' petition for rehearing is reproduced as Appendix "C". The judgment and order on rehearing, dated January 9, 1974, affirming the order of the District Court, is reproduced as Appendix "D". The order denying the motion for stay of the mandate, dated February 11, 1974, is reproduced as Appendix "E" to the petition. The prior opinion of the District Court granting a motion to dismiss is reported in 311 F. Supp. 1293 and is reproduced as Appendix "F". The opinion of the Court of Appeals reversing the dismissal is reported in 440 F. 2d 633 and reproduced as Appendix "G".

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Did the lower courts have jurisdiction in this § 1983 action to review the personal service of the notice of the application for the appointment of the committee by the state court?

2. Was it proper for the court below to sustain an award of damages against petitioner Miller, Commissioner of the Department of Mental Hygiene (who did not enter office until several years after the allegedly defective

committee appointment), and petitioner Dr. Roberts, Director of the Harlem Valley State Hospital (who merely signed his name to the petition by the State for appointment of committee pursuant to statute), and had nothing to do with arranging for or participating in the alleged inadequate service of the notice?

3. Whether under *res judicata* the orders of the State court settling the accounts of the Committee and successor Committee, in the first of which the State court appointed a guardian *ad litem* and in the second the alleged incompetent was represented by her own counsel, were conclusive as to the validity of the payments made to the two committees and the guardian *ad litem* for commissions, fees and expenses?

4. Whether petitioners were entitled to official immunity from such liability especially where it was conceded that such officials were guilty of no wrongdoing, carelessness or absence of good faith?

5. Whether under the doctrine of sovereign immunity, the District Court had jurisdiction to make the award of damages for sums ordered paid to the committees by the State court?

Statement of the Case

Respondent was committed in judicial proceedings to Harlem Valley State Hospital in 1952 by Order of Certification by the State court as a person afflicted with mental disease pursuant to § 74 of the Mental Hygiene Law (since repealed). At no time did she invoke the review procedure provided by former § 76 of the Mental Hygiene Law (now § 31.35).

While respondent was a patient at the hospital, Dr. Roberts, the Director, petitioned the State Supreme Court "on behalf of the state" for an order pursuant to former

CPA § 1374 appointing a Committee to manage her personal and business affairs. The verified petition stated that she had been legally committed to and was an inmate of Harlem Valley State Hospital of which Dr. Roberts was Director, that she was not of sound mind and incompetent to manage her personal property, that she was widowed and had no known kin and set forth the extent of her known property.

The notice of application stated that such application would be heard in Supreme Court, Bronx County, at 10 a.m. on July 24, 1962. The papers were prepared in the usual form by the Attorney General of the State. The papers so filed in the State Court contained an affidavit of personal service by a process server named Miller [unrelated to petitioner Commissioner Miller] (App. H).

On July 24, 1962, the motion for appointment of a committee was granted by default in the State Court, and Defendant Hahn (now deceased) was appointed the committee of respondent's person and property.

By order dated October 13, 1966, made by the State Court, Hahn was allowed to resign as committee and move the judicial settlement of his account. A guardian *ad litem* had been appointed on July 28, 1966, to protect the rights and interests of respondent on such accounting. Such guardian *ad litem* filed a report and affidavit in connection therewith in the State Court.

On April 10, 1967, the State Court settled the final account of Hahn, discharging him as Committee and from any and all further liability once the payments directed by the Court were made, and ordering that defendant Pious be appointed Successor Committee. The amended complaint here alleges that Pious, as Successor Committee (now deceased), received approximately $5,572.78 for respondent's account, representing the balance remaining

after the disbursements ordered by the Court in the settlement of Hahn's account were made.

On April 18, 1967, respondent was discharged from the Hospital. Subsequently, on motion of Pious and the supporting affidavit of respondent, the latter was "declared competent to manage her person and property" by order of the State Court, dated December 13, 1968 which authorized and directed Pious to file a final account and to move for judicial settlement within 30 days unless he restored to plaintiff her property after deducting proper charges, and obtaining therefor a receipt and release, in which event an application could be made *ex parte* for his discharge.

Pious, although willing to return respondent's property, was unsuccessful in his efforts to obtain a receipt and release from respondent. On August 11, 1969, after she was released and declared competent, respondent commenced this action. She stated "for the record" in this case that Pious is not charged "with any impropriety or individual wrongdoing". (*Dale* v. *Hahn*, 311 F. Supp. 1293, 1298). The parties to this litigation agreed that Pious would proceed by April 6, 1970, to settle his account as respondent's Committee in an appropriate state court proceeding to the end that the balance of her property, still in the hands of the Committee, would be restored to her as soon as possible [The amount of $6,094.21 had been paid to the State by the respective Committees for the care and maintenance of respondent].

The State Court, by its order dated June 8, 1970, settled the final account of Pious, upon his application, discharging him as Committee and from any and all further liability once the payments directed by the Court were made. In the judicial proceeding attending such accounting by the defendant Pious, the respondent appeared and was represented by her present attorney and objected to the amount of the claims against her estate, but expressly interposed no objection to the settlement of the committee's

Account. The State Court by its final order dated August 21, 1970, discharged defendant Pious as respondent's Successor Committee and the surety on the bond of such Successor Committee, from any and all liability as to all matters embraced in the final account filed by such Successor Committee.

The respondent on or about August 21, 1970, received from the defendant Pious, the respective sums of $2,030.35 and $554.20, the balance of her estate due her pursuant to the order of the State Court dated June 8, 1970.

It is undisputed that the petitioner Commissioner had no role in the appointment of Hahn, the original Committee for respondent, on July 24, 1962 or of the Successor Commitee, not having been appointed the Commissioner of Mental Hygiene until February 1, 1966, almost four and one-half years later and not being part of the State judicial process appointing the Successor Committee.

Prior Proceedings

Asserting jurisdiction under the Civil Rights statutes, 42 U.S.C. § 1983, and 27 U.S.C. § 1343(3) and (4), the respondent commenced this purported class action against the petitioners and others for (1) a declaratory judgment under 28 U.S.C. §§ 2201 and 2202, declaring that § 102 of the New York Mental Hygiene Law (formerly § 1374 of the Civil Practice Act) which provided a procedure for the appointment of a Committee for a patient of a state mental institution denies plaintiff due process and the equal protection of the laws and invades her right to privacy (2) an injunction restraining further enforcement, operation or execution of the alleged unconstitutional statute and (3) a judgment on a cause of action for money had and received requiring petitioners to return to the respondent and all members of a similar class, all monies had and

received through or by their Committees appointed under such statute.

Respondent also sought preliminary injunctive relief pursuant to 28 U.S.C. § 2284 and a hearing by a special three-judge court. [An applicant, Antonio Excariz, sought leave of this District Court to intervene in the action as a party plaintiff pursuant to Rule 24 Fed. R. Civ. Pro.].

This action was dismissed by the decision-order of Judge Irving Ben Cooper, dated March 26, 1970 (*Dale* v. *Hahn,* 311 F. Supp. 1293). (App. "F"). Judge Cooper's decision rested in part upon the conclusion that the action concerned the infringement of property rights and, consequently, stated no cause of action under the Civil Rights Act, 28 U.S.C. § 1343(3)(4) and 42 U.S.C. § 1983. The Court also found, however, that respondent had failed to raise a substantial constitutional question based upon a factual finding that she had received personal notice of the petition concerning the appointment of a committee to manage her affairs. The motion of the applicant Escariz to intervene in the action prior to its dismissal was denied.

On appeal, the Second Circuit, affirmed in part but by a divided court reversed the dismissal, finding that there were personal Civil Rights involved incapable of pecuniary evaluation justifying a Civil Rights action. Judge Waterman, speaking for the majority, said that the District Court should not have determined the factual adequacy of due process since it had not announced that the motion was being treated as a motion for summary judgment, and that, in any event, the appointment of a guardian *ad litem* might be necessary.

The Court also reversed that part of Judge Cooper's decision which had ruled that the defendants Miller and Roberts enjoyed official immunity (See *Dale* v. *Hahn,* 440 F. 2d 663 (App. "G"). The Court did, however, uphold

the denial of a three-judge court of injunctive relief and held that there were no grounds for treating this as a class action.

In addition, the Court remanded the case for a hearing on the issue of whether respondent had received adequate notice of the application for the appointment of the Committee.

At the hearing on remand, the District Judge, despite an express finding that a witness who testified to personal service upon respondent was "truthful", nevertheless found the notice of Committee appointment inadequate, apparently because of the failure of the process server to read and explain each page of the notice and petition to respondent. (App. "A"). Such part of the decision reads:

> "I don't think I have to resolve these questions. I accept her testimony that she has no present recollection of ever having received this paper, therefore, never having received it, which obviously means that she either never got it at all or it was handed to her in circumstances where its meaning did not get through to her.
>
> "Having observed her, I am satisfied that if she had been in anything like a normal condition, had this last paragraph of the third page of this exhibit been read to her, there would have been a reaction which would have made it apparent that she did not like what was going on.
>
> "Therefore, I find as a fact that petitioner has borne the burden of establishing that she was not *adequately* served with the notice of the proceeding." (Emphasis supplied)

Reasons for Granting the Writ

A.

The lower courts without any authority voided the orders of the state courts. The District Court had no jurisdiction to review the validity of the personal service of the notice upon respondent resulting in the order appointing the committee, and in imposing a jurisdictional requirement that the contents of the notice be read to respondent to make the service of the notice adequate.

The state court appointment of the committee was predicated upon personal service upon respondent. There was no jurisdictional authority for the federal courts to review such personal service *ab initio*. Any traverse of such service determined by the state court was required to be made in that court.

The reversal by the Court of Appeals upon the first appeal of the judgment of dismissal and the remanding of the issue of personal service of the notice in the state court for trial by the District Judge, was contrary to law. The subsequent decision of the District Judge upon such remand must be considered, in passing upon that alleged issue. Failure to do so constituted an excess of jurisdiction by such District Court.

This was not a *habeas corpus* case. The District Court had no jurisdiction to review the issue sought to be tendered of whether the notice of application was personally and properly served upon the respondent and to hold a hearing as if it was a reviewing court.

The courts below must have felt this because they insisted upon more than this personal service as provided in New York statute (CPLR 308), seemingly holding that New York case law required more than personal service, that the nature of the application should have been made

clear to respondent. But the respondent should have challenged the finality of such service in the state court, where state case law could be evaluated properly. No New York case supports the view of the Court of Appeals expressly or by implication.

Reliance upon *Mullane* v. *Central Bank & Trust Co.*, 339 U.S. 306 (1950), which involved notice by publication, and *City of New York* v. *New York, New Haven & Hartford Railroad Co.*, 344 U.S. 293 (1953), where this Court described notice by publication as "a poor and sometimes a hopeless substitute for actual service of notice" (344 U.S. at 296), is misplaced. Here the order appointing the committee is based upon actual physical service of the notice of application. On the contrary, the decision below is in direct conflict with *Chaloner* v. *Sherman*, 242 U.S. 55 (1917).

B.

The decision below effects an unconstitutional award of damages based solely on alleged failure of valid service of notice leading to a Committee appointment as against two defendants, one of whom had nothing whatever to do with the appointment and the other of whom merely signed the Petition for Appointment in the regular course of his duties as provided by statute.

It is uncontroverted that petitioner Miller, the Commissioner of Mental Hygiene, not only had nothing to do with the allegedly defective Committee appointment, but was not even appointed Commissioner until several years thereafter. Likewise, defendant Dr. Roberts merely signed the petition for appointment in the regular course of his duties as hospital director as provided by statute (Mental Hygiene Law § 102). As to him, if the finding of the District Court be read as holding that service of the notice was defective, that constitutes no judicial basis for imposing any liability upon Dr. Roberts, simply because in the application by the State he signed the petition.

The finding of liability for damages against these two defendants completely ignored the admonition of this Court in *Monroe* v. *Pape,* 365 U.S. 167, 187-192, to the effect that § 1983 "should be read against the background of tort liability that makes a man liable for the natural consequences of his actions". (365 U.S. at 187).

This principle was reiterated by this Court in *Pierson* v. *Ray,* 386 U.S. 547, 556 (1967). Indeed there is no legal precedent for a finding of liability for damages against a defendant who, like defendant Miller, had nothing whatever to do with the alleged wrong.

This Court denied certiorari to the Second Circuit in *Oswald* v. *Sostre,* 404 U.S. 1049; 405 U.S. 978 (1972), a case where that Circuit, in an *en banc* decision *sub nomine* *Sostre* v. *McGinnis,* 442 F. 2d 178 stated:

> ". . . although Sostre was entitled to damages against Warden Follette, Follette's successor as Warden, who had no part whatsoever in Follette's wrongful conduct against Sostre, incurred no personal money responsibility upon Follette's death."

This principle was reiterated by another panel of the Court of Appeals itself in *Johnson* v. *Glick,* 481 F. 2d 1028, 1034 (1973).

See also *Spears* v. *Continental Bus System,* 226 F. 2d 94 (9th Cir., 1955), cert. den. 350 U.S. 950. More recently in *Boettger, etc.* v. *Moore,* 483 F. 2d 86, 87 (9th Cir. 1973), the Court pointed out that "the lower officials are not the employees of the higher officials; both are fellow servants of the city, an immune governmental agency." [Here, the State].

See too: *Roberts* v. *Williams,* 456 F. 2d 819 (9th Cir. 1971) cert. den. 404 U.S. 866; *Jennings* v. *Davis,* 476 F. 2d 1271, 1274 (8th Cir., 1973) and cases cited therein.

From all of the above it is clear that the affirmance herein not only violated the admonition of this Court in *Monroe* v. *Pape, supra,* reiterated in *Pierson* v. *Ray, supra,* but violated the rule of the Second Circuit itself as enunciated in *Sostre* v. *McGinnis, supra,* and *Johnson* v. *Glick, supra,* as well as that of the "vast majority of federal courts in cases such as this". *Jennings* v. *Davis, supra* at 1274. This Court and the cited decisions have universally rejected any theory of "respondeat superior" in such cases.

Indeed, it would be difficult to find a case where an assessment of damages is more of a deprivation of basic rights. In the brief of respondents upon the first appeal, the respondent maintained [Br. p. 44] that the petitioners were responsible in damages despite "the fact that the defendants were guilty of no wrongdoing, carelessness or absence of good faith . . ." in reliance upon *Ex Parte Young,* 209 U.S. 123 [which, of course, only applied to injunctions].

In her brief in the Circuit Court, respondent indulged in criticism of Dr. Roberts for having signed the petition submitted to him by the Attorney General (Br. upon rehearing, pp. 3-6) although this had nothing to do with the issue before the court.

As to Commissioner Miller, respondent conceded that his "responsibility for what happened to plaintiff is less direct and extensive than defendant Roberts'" (Id. p. 7). Then, after convolutions in reasoning referring to aspects which had no bearing on the matter before the District Court, respondent's brief concluded that: "Defendant Miller knew that under the procedures then in effect, patients whom it was his statutory duty to protect could be adjudged incompetent without notice or hearing [not before the court]. He did nothing to change those procedures, though empowered to do so. Accordingly, at least

with respect to all sums appropriated and expended by plaintiff's *successor* Committee, who was appointed during defendant Miller's tenure, defendant Miller may be found liable" (Id. p. 9).

Apart from the wholly irrelevant character of this rationale, the fact is that courts below found petitioner liable in the judgment appealed from not only for any sums expended by the Successor Committee, also for the sum expended by the original Committee, appointed years before Commissioner Miller's tenure.

What the decision on review here does in effect is, as to petitioner Miller, to deprive him of property under the guise of tort liability for which he had no part, and as to petitioner Roberts, to assess damages against him for merely carrying out his duties without any semblance of malice or intent to unlawfully deprive plaintiff of her property and without any responsibility for the alleged incomplete service.

C.

The rejection by the Circuit Court of the doctrine of official immunity in the first appeal, which the appellate court in the second appeal regarded as binding, is contrary to the decisions of this Court and the trend of decisions of the lower federal courts.

The District Court in the original decision dismissing the complaint held that petitioners were "immune from suit by virtue of their official immunity. (citations)" and pointed out that "No wrongdoing, carelessness or absence of good faith is alleged" in the application for the Committee appointment and "'is an act expressly provided for and authorized by [New York] law.' *Franklin* v. *Meredith,* 386 F. 2d 958, 961 (10th Cir. 1967). See also *Francis* v. *Lyman,* 216 F. 2d 583, 585 (1st Cir. 1954)." (App. "F").

The Court of Appeals agreeing that "the limits of official immunity in the context of the Civil Rights Law is far from certain" held that the doctrine "should be applied sparingly in suits brought under § 1983". Relying upon three of its own cases *Birnbaum* v. *Trussell,* 347 F. 2d 86, *Johnson* v. *Hemme,* 355 F. 2d 129 and *Kletschka* v. *Driver,* 411 F. 2d 436, the Court of Appeals rejected the doctrine here upon the ground that the responsibility of petitioners here sought was for compensatory damages, not for consequential or punitive damages (440 F. 2d at 638), a rationale for which there is no support to be found.

In rejecting the application here, the Court of Appeals acknowledged (at p. 637) that under similar circumstances the policemen in *Pierson* v. *Ray,* 386 U.S. 547, 557-58, would be entitled to immunity. See too *Barr* v. *Mateo,* 360 U.S. 564 (1959) (App. "G").

It seems apparent that the holding of a panel of the Court of Appeals as to official immunity upon the first appeal, which was held binding upon the second appeal (App. "B"), represents a reluctance to accept the authoritative decisions by this Court as to the application of immunity in § 1983 cases except as the case by case application is decided by this Court. Since it is also in conflict with the decisions of other circuits, it deserves the attention of this Court and plenary consideration.

D.

The courts below failed to recognize that the award of damages was in contravention of the doctrine of sovereign immunity.

The failure to sustain the defense of immunity here because of the characterization of damages as "compensatory damages" is made more remarkable by the fact that these damages are in essence the recovery of money from the State, since the application for the appointment of the Committee was made by the State upon papers prepared

by its Attorney General pursuant to existing state statute. and the alleged damages would have to be paid out of the State Treasury. Indeed, the opinion of the Court of Appeals in the more recent opinion recognized that it was the State that was serving the Notice of Application (App. "G"). This award is in defiance of the Eleventh Amendment. *Rothstein* v. *Wyman*, 467 F. 2d 226 (2d Cir. 1972), cert. den. 411 U.S. 921 (1973); *Williams* v. *Eaton*, 443 F. 2d 422 (10th Cir. 1971) and cases cited.

This was pointed out by this Court in *Employees, etc.* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973) and *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963). The Circuit Court held that its consideration was "foreclosed by our prior decision." Such manifest error should be reviewed by this Court and set aside.

The action of the courts below is contrary to the most recent holding of this Court in *Edelman* v. *Jordan*, No. 72-1410, decided March 25, 1974 and warrants summary reversal (42 LW 4419).

E.

The State court proceedings, in which a Guardian *ad litem*, appointed by the court, participated, constituted *res judicata* and estopped respondent from challenging validity.

The nature of the order appointing the committee upon proof of service upon the respondent was conclusive upon respondent as to any objection she might have raised. *American Surety Co.* v. *Baldwin*, 287 U.S. 156, 169 (1932).

Subsequently the account filed by the defendant Hahn was approved by the State court and he was discharged. Prior to such approval a Guardian *ad litem*, appointed by the court, as appears from the opinion of Judge Cooper, "filed a report and affidavit in her behalf in connection therewith" (App. "F"). The approval included the deduction of the sum for Hahn's commission and expenses, for

which the petitioners have been held responsible by the judgment appealed from. Regardless of the contention that the original notice was not effectively served because not read to respondent by the process server (App. "A"), the approval of this account, after respondent was represented by the guardian *ad litem*, also constituted *res judicata* estopping respondent's challenge upon due process grounds in the District Court. *Angel* v. *Bullington*, 330 U.S. 183, 192-93 (1947); *Fishgold* v. *Sullivan Corp.*, 328 U.S. 275, 282-83 (1946); *Ashe* v. *Swenson*, 397 U.S. 436, 443 (1970); *Preiser* v. *Rodriguez*, 411 U.S. 475, 497 (1973); *Stuhl* v. *Tauro*, 476 F. 2d 233 (1st Cir. 1973). See too Restatement of Judgments, vol. 17, 1942 ed; 45c, comment d and 49, comment b.

New York law places custody of property of an incompetent person in the state court *In re Matson*, 293 N.Y. 476, 481 (1944) whether or not such incompetency has been adjudicated and whether or not a committee has been appointed. *Wurster* v. *Armfield*, 175 N.Y. 256, 262 (1930); *American Mortgage Co.* v. *Dewey*, 106 App. Div. 389, 392; 94 N.Y.S. 808 (1905).

The Court of Appeals, upon the first appeal [by the respondent] in addition to its published opinion at 440 F. 2d 633 (App. "G"), filed an unpublished opinion on April 5, 1971, denying rehearing to petitioners (App. "J"), in which it stated (in part):

> "Likewise, the new claim that the state court accounting, which was completed subsequently to the proceedings appealed from subsequently to the proceedings appealed from, is now *res judicata* must first be resolved upon the enlarged record."

Subsequently, petitioners in their answer squarely raised the defense as to whether the approval of the account in the state court proceeding in which the respondent was represented by the Guardian *ad litem* effectively barred the respondent from challenging the payment of the com-

missions to the committee, the defendant Hahn or the allowance by the state court to the Guardian *ad litem* appointed by the court despite the asserted initial lack of proper service of the original application for the appointment of the committee (App. "A"), as conceded by respondent below (Resp. br. Court of Appeals, pp. 22-23).

The principle is highlighted still more by the fact that the balance of the sum, for which the petitioners have been held personally responsible is the commission and expenses allowed, upon the final accounting, to the successor committee, who had been appointed as part of the discharge of the original committee, upon the recommendation of the Guardian *ad litem* appointed by the court. This appointment pursuant to New York Civil Practice Rules 1201 could not be challenged in the District Court as well as that of the original committee, particularly since it provided the protection of the Guardian *ad litem*, which the Court of Appeals upon the first appeal stated might be necessary for effective jurisdiction (App. "G").

The conclusion as to the incontestable appointment of the successor committee is not dissipated or even lessened by the stipulation in the district court as to the final account (App. "I"), since the appointment of the successor committee was, in fact, not subject to challenge, without regard to the alleged infirmity in the appointment of the original committee. Indeed, it adds to the erroneous consideration of the validity of the State court procedures, even while the State proceedings were pending and a full opportunity offered to respondent to challenge any of the proceedings by an application in the State court. *Atlantic Coast Line R. R. Co.* v. *Brotherhood, etc.*, 398 U.S. 281, 296 (1970) points to the indefensible intrusion in the State court procedure by such action.

CONCLUSION

For the foregoing reasons this petition for certiorari should be granted.

Dated: New York, New York, March 26, 1974.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Petitioners

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

DAVID H. BERMAN
Assistant Attorney General
of Counsel

Appendix "A"

Opinion, Memorandun and Order of W. Knapp, U.S.D.J.

DECISION OF THE COURT

The Court: (Knapp, L. J.) I think I am prepared to rule on the question that is before me, which is set forth in the Court of Appeals opinion at page 638, 639.

The question is, has pettioner borne the burden of proof of showing that she was not served adequately with this document which is before me, Defendants' Exhibit B?

Now, I have before me the testimony of two witnesses, each of whom impressed me as truthful: Mr. Miller and the petitioner. Mr. Miller testifies to a course of actions which, if followed, would have put this physicial paper in the petitioner's possession. However, he specifically indicated he did nothing more towards explaining to the petitioner what the pape: was than read her this formal caption in the beginning of his affidavit.

Attached to the paper is a statement indicating that the New York Life Insurance Company is about to turn over the machine belonging to the petitioner to the hospital. The witness apparently did not call that to petitioner's attention.

On the other hand, the petitioner says that she never received this paper, hasn't any recollection of receiving it.

Even without the doctor's testimony, it did seem to me that she had a fairly accurate memory of what went on in those days, especially anything that related to that machine. Thefefore, I am confronted with the question: Is it more probably than not—which is the definition of "burden of proof" in a civil case—that the petitioner did not receive adequate notice of this paper.

Appendix "A".

There are several explanations of the conflict which could be suggested. In the first place, there could have been a mistake at the hospital. That seems unlikely, although it certainly is a possibility. Petitioner may have been under some mental stress at the time, so that just reading this paper, shown to her without calling her attention to what the case was all about, might not have impressed her as significant.

I don't think I have to resolve those questions. I accept her testimony that she has no present recollection of ever having received this paper; therefore, never having received it, which obviously means that she either never got it at all or it was handed to her in circumstances where its meaning did not get through to her.

Having observed her, I am satisfied that if she had been in anything like a normal condition, had this last paragraph on the third page of this exhibit been read to her, there would have been a reaction which would have made it perfectly apparent that she did not like what was going on.

Therefore, I find as a fact that petitioner has borne the burden of establishing that she was not adequately served the notice of the proceeding.

Counsel can submit memoranda as to what they respectively think is the appropriate proceeding to follow from that finding.

Mr. Ennis: Thank you, your Honor.

Mr. Meyer: Thank you, your Honor.

The Court: You can agree among yourselves as to the schedule of memoranda.

Appendix "A".

MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

RITA HOOPER DALE, a former incompetent person,

Plaintiff,

against

DEMAREST J. HAHN, Individually and as committee of the person and property of Rita Hooper Dale, for the period of July 24, 1962 until April 10, 1967; ALAN D. MILLER, M.D., individually and as Commissioner of the New York State Department of Mental Hygiene; EDWARD PIOUS, individually and as committee of the person and property of Rita Hooper Dale for the period of April 10, 1967 until the present; and LAWRENCE P. ROBERTS, M.D., individually and as Director of Harlem Valley State Hospital,

Defendants.

Plaintiff, a former patient at Harlem Valley State Hospital, brought this action in 1969 to have declared void state proceedings at which she was adjudged to be an incompetent and committees appointed to handle her affairs, on the ground that she had not been given adequate notice of those proceedings. Plaintiff sought recovery of her money that had been expended by the committees for various purposes, including payment of her hospital bills.

Judge Cooper dismissed the complaint for reasons here irrelevant. The Court of Appeals reversed in part and remanded the case to the district court for trial on the

question of whether plaintiff had been adequately notified of the committee-appointment proceeding. 440 F.2d 633. After trial on April 9, 1973 I ruled that she had not, and reserved decision as to the consequences of that ruling.

Two questions are before me: (1) is plaintiff entitled to recover the total amount of money spent by the committees, notwithstanding that part of it went towards her hospital bill, and (2) should all or any portion of the records related to the void state proceedings be ordered expunged.

As to the first question, plaintiff contends that my earlier finding should result in a tabula rosa, and that the hospital should be forced to sue plaintiff in state court to collect its bill in a proceeding where plaintiff could raise defenses—a proceeding that plaintiff would welcome for the purpose of litigating whether the hospital in fact gave "treatment" to her. However I find that the Court of Appeals' decision conclusively establishes that plaintiff may not recover the money paid to the hospital by her first committee.

The Court stated:

> ". . . if plaintiff succeeds in her challenge to the appointment of her committees, she will be entitled to reimbursement from defendants for the expenses charged against her assets through the operation of the committees. However, as to the amounts paid to the Department of Mental Hygiene for services rendered by that Department, recovery should be disallowed to avoid multiple litigation. Plaintiff was liable for these latter amounts irrespective of the appointment of the committees; and the accounting in the state courts, at which plaintiff was fully represented, is *res judicata* as to these amounts." 440 F.2d at 638, fn. 8.

Plaintiff has offered no reason why the amounts paid to the hospital by her second committee should be treated

any differently. Thus her reliance upon language in an order entered by the Court of Appeals denying a petition for rehearing brought by two of the defendants, is misplaced.

In addition to the clear mandate provided by the Court of Appeals, New York Mental Hygiene Law § 43.11 (which is substantially identical to § 40 of the old law) furnishes support for disallowing recovery of the money applied by the committees to the hospital bill. That section permits charges paid to the commissioner of the Department of Mental Hygiene to be *refunded* were they paid, among other things, for "services which were not rendered". In my view the statute plainly contemplates the bringing of suits *by* aggrieved patients for refunds, and not suit in the first instance by the hospital for the charges as plaintiff would like.

Practically speaking, the fact that plaintiff is eager to contest the bill in state court reduces the impact of this decision to a determination of which side must there take the initiative. I see no reason why plaintiff should not bear that burden.

As to the second question, I do not agree with plaintiff that all records relating to the proceedings here declared void should be expunged. I can imagine no prejudice resulting to plaintiff from the state's conservation of its records (*cf. Bilick* v. *Dudley,* S.D.N.Y. (67 Civ. 3317), and therefore am loathe to dictate that the state destroy them when they may in its judgment serve some useful purpose. I deem fully curative the attorney-general's suggestion that a copy of this Order be filed wherever are kept records relating to the incompetency proceedings.

It is

ORDERED that the judgment of Hon. Bernard Newman, Justice of the Supreme Court, Bronx County, on July 24,

1962, declaring plaintiff incompetent and appointing a committee is null and void *ab initio;* and it is

FURTHER ORDERED that the defendants return no later than June 1, 1973 to plaintiff $2,152.35 expended by plaintiff's committees, as a result of the said null and void proceedings, together with interest at the rate of 6% per annum accrued from July 24, 1962 to the date of this order; and it is

FURTHER ORDERED that the incompetent status of the plaintiff be null and void *ab initio;* and it is

FURTHER ORDERED that a copy of this Order be filed with all records relating to plaintiff's committees and status as an incompetent.

Dated: New York, New York, May 7, 1973.

WHITMAN KNAPP
WHITMAN KNAPP, U.S.D.J.

Appendix "B"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1081, 1098—September Term, 1972.

(Argued June 28, 1973 Decided September 24, 1973.)

Docket Nos. 73-1795, 73-1934

RITA HOOPER DALE, a former incompetent person,

Plaintiff-Appellee-Appellant,

v.

DEMAREST J. HAHN, individually and as committee of the person and property of Rita Hooper Dale, for the period of July 24, 1962 until April 10, 1967, et al.,

Defendants-Appellants-Appellees.

Before:

LUMBARD, HAYS and TIMBERS,

Circuit Judges.

Cross-appeals from order entered in the Southern District of New York, Whitman Knapp, *District Judge,* directing payment to a former incompetent person by her committees of $2,152.35 representing sums improperly expended from her estate, and declaring her status as an incompetent to have been null and void *ab initio.*

Affirmed.

Appendix "B".

DAVID H. BERMAN, Asst. Atty. Gen., New York, N.Y. (Louis J. Lefkowitz, Atty. Gen., and Irving Galt, Asst. Atty. Gen., New York, N.Y., on the brief), *for Defendants-Appellants-Appellees.*

JONATHAN A. WEISS, Legal Services for the Elderly Poor, New York, N.Y. (Bruce J. Ennis, N.Y. Civil Liberties Union, and Bernard C. Durham, Legal Services for the Elderly Poor, New York, N.Y., on the brief), *for Plaintiff-Appellee-Appellant.*

TIMBERS, *Circuit Judge:*

These cross-appeals are from an order entered May 7, 1973 in the Southern District of New York, Whitman Knapp, *District Judge,* which (1) held that the 1962 state court order declaring plaintiff-appellee-appellant Rita Hooper Dale ("appellee") to be incompetent and appointing a committee to manage her affairs was null and void *ab initio;* and (2) directed the return to appellee by defendants-appellants-appellees ("appellants")[1] of the sum of $2,152.35, plus interest from July 24, 1962, representing expenditures, other than payments to the New York State Department of Mental Hygiene, made by the committees from her estate.

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[1] The named defendants included Demarest J. Hahn, who served as the committee to manage appellee's affairs from July 24, 1962 until his resignation on October 13, 1966; Alan D. Miller, M.D., Commissioner of the New York State Department of Mental Hygiene; and Lawrence P. Roberts, M.D., Director of Harlem Valley State Hospital. A fourth defendant, Edward Pious, who served as the successor committee following Hahn's resignation, was dropped as a defendant upon the final settlement of his account pursuant to a stipulation approved by Judge Cooper on February 10, 1970.

Appendix "B".

The primary issue raised on appeal is whether the district court's finding[2] that appellee had not been adequately notified of the committee-appointment proceeding was clearly erroneous. We hold that it was not. We affirm.

I.

In 1951, appellee was involuntarily committed to a state mental hospital where she remained until 1967.[3] In 1962, allegedly due to appellee's failure to pay the New York Department of Mental Hygiene for services and treatment provided her, the hospital director filed a petition in the New York Supreme Court, Bronx County, seeking an order declaring appellee incompetent and appointing a committee to manage her affairs.[4] No hearing was held. On July 24, 1962, the petition was granted. Appellant Hahn was appointed as the committee. Upon the court's acceptance of Hahn's resignation in 1966 and the settlement of his account, defendant Pious was appointed as the successor committee pursuant to the same procedure. On April 18, 1967, appellee was discharged from the hospital. She subsequently was declared competent to manage her own affairs.

During the tenure of the committees, almost $8,000 of appellee's assets was expended, of which $5,686.16 was

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[2] This finding was made in open court at the conclusion of the trial on April 9, 1973, at which time decision was reserved on the consequences of this finding. A memorandum and order was filed on May 7, 1973.

[3] We assume familiarity with prior proceedings and the background of the case as outlined in Judge Cooper's opinion of March 26, 1970, 311 F.Supp. 1293 (S.D.N.Y. 1970), and our opinion of February 19, 1971, 440 F.2d 633 (2 Cir. 1971), reversing in part and remanding.

[4] The petition was filed and processed pursuant to the procedures outlined in what is now N.Y. Mental Hygiene Law § 102 (McKinney 1971) (formerly N.Y. CPLR § 1374).

paid to the Department of Mental Hygiene. The remainder went for expenses which appellee allegedly would not have incurred had she been permitted to manage her own affairs.

In 1969, appellee commenced in the Southern District of New York a class action challenging the constitutionality of N.Y. Mental Hygiene Law § 102 (McKinney 1971) on the ground that its provision for the appointment of a committee to manage the affairs of an incompetent, without first affording to the incompetent notice of the proceedings and an opportunity to be heard in opposition, violated the due process clause of the Fourteenth Amendment. Declaratory and injunctive relief was sought, together with the return of all sums expended by the allegedly unlawful committees.[5] On March 26, 1970, Judge Cooper denied the motion to convene a three-judge court and dismissed the complaint. 311 F.Supp. 1293 (S.D.N.Y. 1970). On appeal, we affirmed the denial of the motion for a three-judge court and the determination that the class action was inappropriate; but we reversed the dismissal of the complaint and remanded for the purpose, inter alia, of determining the adequacy of the notice given to appellee of the committee-appointment proceedings. 440 F.2d 633 (2 Cir. 1971).

On remand, Judge Knapp held the notice to have been inadequate. In an oral finding of fact made at the conclusion of the trial, he found that the testimony of appellee and John C. Miller (the state's process server), both of whom were credited as "truthful" witnesses, indicated either that appellee had not been served with notice of

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[5] Jurisdiction was invoked pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (1970), and its jurisdictional implementation, 28 U.S.C. § 1343 (1970). The request for declaratory relief was premised on the Declaratory Judgments Act, 28 U.S.C. §§ 2201-02 (1970).

the proceeding at all, or that "it was handed to her in circumstances where its meaning did not get through to her.'"[6] Either of these situations, the Court held, would satisfy appellee's burden of establishing that she was not provided with adequate notice. In its written memorandum and order that followed, the court held that our 1971 decision precluded appellee from asserting that she could recover sums paid to the Department of Mental Hygiene by the first committee, and further that she "has offered no reason why the amounts paid to the hospital by her second committee should be treated any differently".[7] That order is now ordered on appeal by both sides. Appellants contend that the finding of inadequate notice was erroneous. Appellee objects to the limitation of recovery to payments other than those to the Department of Mental Hygiene.

II.

As stated above, the district court did not determine whether appellee was or was not physically served with

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[6] This finding was based in large part on the judge's view of appellee's likely reaction to adequate notice:

> "Attached to the [process affidavit] is a statement indicating that the New York Life Insurance Company is about to turn over the machine belonging to the [appellee] to the hospital. The [process server] apparently did not call that to [appellee's] attention.
>
> • • •
>
> Even without the doctor's testimony, it did seem to me that she had a fairly accurate memory of what went on in those days, especially anything related to that machine . . . .
>
> Having observed her, I am satisfied that if she had been in anything like a normal condition, had this last paragraph on the third page of this exhibit been read to her, there would have been a reaction which would have made it perfectly apparent that she did not like what was going on."

[7] The court also denied appellee's request to have all records of the committee-appointment proceeding expunged.

notice of the committee-appointment proceeding. Rather, the finding was to the effect that, assuming arguendo that appellee actually had been served, under the circumstances of her incompetency such notice was inadequate.

The premise underlying that finding is that there may be situations in which physical service of process will not constitute adequate notice. We are satisfied that such a premise is supported by the cases.

The landmark case dealing with the question of constitutional sufficiency of notice, *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), while distinguishable on its facts, nevertheless does have a direct bearing here. In *Mullane*, the Court held that notice by publication was inadequate to inform known beneficiaries of a common trust fund of the proposed judicial settlement of certain accounts by the trustee. In so holding, the Court stated the critical due process requirement as follows:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . .
>
> [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the [person] might reasonably adopt to accomplish it. . . ." 339 U.S. at 314-15 (citations omitted).

The New York state courts likewise have recognized the importance of the particular circumstances of a case in assessing the constitutional adequacy of notice. One court summarized the rule as permitting a finding of inadequacy where "the circumstances [are] such as to show that the [recipient] did not come into actual possession of the

papers and that his attention was not drawn to their character, or that he had not willfully ignored them and refused to ascertain their nature for the purpose of evading service." *Heller* v. *Levinson*, 166 App. Div. 673, 674, 152 N.Y.S. 35, 36 (1st Dept. 1915). See *In re Barbara*, 14 Misc. 2d 223, 226-27, 180 N.Y.S.2d 924, 928 (Sup. Ct., Tioga Co., 1958), *aff'd*, 7 App. Div. 2d 340, 183 N.Y.S.2d 147 (3d Dept. 1959). This rule has been held to require the vacating of an order where, despite undisputed personal written notice of an impending judgment of foreclosure, the recipient's "advanced age and lack of experience and understanding" were such as to lull her "into a false state of security". *Brown* v. *Giesecke*, 40 App. Div. 2d 1009, 338 N.Y.S.2d 967, 969 (2d Dept. 1972). See also *In re Coates*, 9 N.Y.2d 242, 251-53, 173 N.E.2d 797, 802-03, 213 N.Y.S.2d 74, 81-82, *appeal dismissed sub nom. Coates* v. *Walters*, 368 U.S. 34 (1961).

The decision below was in accord with those principles.[8] The state was not serving notice on an ordinary party in a civil suit; on the contrary, it was dealing with a person committed to a state mental hospital as an incompetent—a fact necessarily known to the state in light of the very nature of the proceeding. The district court found that the notice given was not reasonably calculated under the circumstances to apprise appellee of the fact that a substantial

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[8] *Chaloner* v. *Sherman*, 242 U.S. 455 (1917), does not compel a different conclusion. There, damages were sought by a person adjudged to be an incompetent for the withholding of his property by a committee appointed under New York law. Plaintiff alleged that the applicable statute was unconstitutional because there was no express requirement of notice and an opportunity to be heard at the committee-appointment proceeding. The Supreme Court's affirmance of the order directing a verdict in favor of the defendant committee was based on the finding that plaintiff had received constitutionally adequate notice at every stage and that the failure to oppose the petition was therefore not open to collateral attack. 242 U.S. at 461.

interest was involved. We hold that finding to have been permissible as a matter of law, and on the record before us it was not clearly erroneous.

III.

Appellee's cross-appeal raises the propriety of limiting the measure of damages to all expenditures incurred by the committees with the exception of those payments made to the Department of Mental Hygiene. In our earlier decision, we stated:

> "[I]f plaintiff succeeds in her challenge to the appointment of her committees, she will be entitled to reimbursement from defendants for the expenses charged against her assets through the operation of the committees. However, as to the amounts paid to the Department of Mental Hygiene for services rendered by that Department, recovery should be disallowed to avoid multiple litigation. Plaintiff was liable for these latter amounts irrespective of the appointment of the committees; and the accounting in the state courts, at which plaintiff was fully represented, is *res judicata* as to these amounts." 440 F.2d at 638 n. 8.

The decision of the district court that was the subject of that appeal was rendered subsequent to the settlement of the first committee's account and prior to the settlement of the second committee's account (effected in the Supreme Court, Bronx County, on June 8, 1970). Judge Knapp read our opinion as "conclusively establish[ing] that [appellee] may not recover the money paid to the hospital by her first committee". He further held that appellee had failed to demonstrate why the amounts paid to the Department by the second committee should be treated otherwise.

Appellee contends that the district court improperly felt itself constrained so to limit the appropriate relief. She points particularly to our order of April 5, 1971 denying appellant's petition for rehearing in which we said that "the new claim that the State court accounting, which was completed subsequent to the proceedings appealed from, is now *res judicata* must first be resolved below upon the enlarged record." She argues, in other words, that the hospital should be forced to sue her for the amounts allegedly due —a proceeding the district court noted she "would welcome for the purpose of litigating whether the hospital in fact gave 'treatment' to her."

In our prior decision we held that any ultimate judgment against appellee's first committee was not to include payments made to the Department of Mental Hygiene for services rendered by that Department. We find no basis for re-opening that question.* The only issue properly before us, therefore, is whether the district court, in limiting the extent of recovery against the second committee, erred in reaching a conclusion consistent with that arrived at with respect to the first committee.

The purpose of a final accounting under N.Y. Mental Hygiene Law § 113 (McKinney 1971) is to determine the propriety of the actions of the committee. *In re Bendheim*, 187 Misc. 372, 374, 66 N.Y.S. 2d 445, 447 (Sup. Ct., Orange Co., 1946). The accounting proceeding, however, may not inquire into the specific charges of the Department of Mental Hygiene for services rendered to a patient at a state mental hospital. *In re Asker*, 284 App. Div. 712, 716, 134 N.Y.S. 2d 685, 689 (4th Dept. 1954), *aff'd*, 309 N.Y. 983, 132 N.E.2d 985, 134 N.Y.S.2d 685 (1956). Protection to a

* The quoted statement in the order denying the petition for rehearing undoubtedly is of no effect in regard to the first committee, the point being limited both in terms and in common sense to the post-judgment settlement of the second committee's account.

patient who alleges an overcharge, or that a charge for services was not actually rendered, is provided for in N.Y. Mental Hygiene Law § 43.11 (McKinney Supp. 1972) (formerly N.Y. Mental Hygiene Law § 40), which authorizes an action *brought by the patient* in which the relevant allegations can be made. Within that framework, it seems proper to give conclusive effect to the determination made in the accounting proceeding for purposes of the present action. We therefore agree that the measure of recovery should be limited to items found in that accounting to be other than those charged by the Department of Mental Hygiene for services rendered, subject to appellee's continuing right to challenge the Department's charges in a state proceeding pursuant to Section 43.11.

In short, we hold that district court's conclusion that the state accounting of the second committee was *res judicata* was in accord with both state law and the considerations that led us to reach a like conclusion with respect to the first committee.

IV.

A final question concerns the State's contention that the order directing payment to appellee is improper under the Eleventh Amendment on the ground that the defendant state officials are immune from suit. The short answer to that claim is that it is foreclosed by our prior decision. 440 F.2d at 637-38. In the absence of any compelling reason to depart from that position, we hold that our earlier decision on the issue of sovereign immunity is the law of the case. *Wharton* v. *Hirsch*, 348 F.2d 906, 907 (2 Cir. 1965).

Affirmed.

Appendix "C"

Order of Court of Appeals Granting Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of November, one thousand nine-hundred and seventy-three.

Present:

HON. J. EDWARD LUMBARD,
HON. PAUL R. HAYS,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

Docket Nos. 73-1795
73-1934

RITA HOOPER DALE, a former incompetent person,

Plaintiff-Appellant,

v.

DEMAREST J. HAHN, individually and as committee of the person and property of Rita Hooper Dale, for the period of July 24, 1962 until April 10, 1967, ALAN D. MILLER, M.D., individually and as Commissioner of the New York State Department of Mental Hygiene, EDWARD PIOUS, individually and as committee of the person and property

of Rita Hooper Dale for the period of April 10, 1967 until the present, and LAWRENCE P. ROBERTS, M.D., individually and as Director of Harlem Valley State Hospital,

Plaintiffs-Appellants.

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is granted.

Further ordered that counsel for all parties shall file any additional briefs on or before December 13, 1973, and that reconsideration shall be had without oral argument.

.....

A. Daniel Fusaro, Clerk

TIMBERS, J. dissents and votes to deny the petition.

Appendix "D"

Judgment and Order Upon Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the ninth day of January, one thousand nine hundred and seventy-four.

Present: HON. J EDWARD LUMBARD,
HON. PAUL R. HAYS,
HON. WILLIAM H. TIMBERS,
Circuit Judges.

Docket Nos. 73-1795
73-1934

RITA HOOPER DALE, a former incompetent person,

Plaintiff-Appellee,

v.

DEMAREST J. HAHN, individually and as committee of the person and property of Rita Hooper Dale, for the period of July 24, 1962, until April 10, 1967; ALAN D. MILLER, M.D., individually and as Commissioner of the New York State Department of Mental Hygiene; EDWARD PIOUS, individually and as committee of the person and property of Rita Hooper Dale, for the period of April 10, 1967, until the present; and LAWRENCE P. ROBERTS, M.D., individually and as Director of Harlem Valley State Hospital,

Defendants-Appellants.

Appendix "D".

After entry of our original decision in this case, slip op., doc. nos. 73-1795, 73-1934 (Sept. 24, 1973), a majority of the panel voted to grant the defendants' petition for rehearing because we were troubled that we might not have had a full enough view of the facts at issue. Having been further enlightened on this by the parties' briefs on rehearing, we conclude that our original decision in the case was correct. The judgment of the district court is accordingly affirmed.

So ordered.

J. Edward Lumbard
J. Edward Lumbard
United States Circuit Judge

Paul R. Hays
Paul R. Hays
United States Circuit Judge

Wm. H. Timbers
William H. Timbers
United States Circuit Judge

Appendix "E"

Court of Appeals Order Denying Stay of Mandate.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of February, one thousand nine hundred and seventy-four.

RITA HOOPER DALE, a former incompetent person,

Plaintiff-Appellant,

v.

DEMAREST J. HAHN, individually and as Committee of the person and property of Rita Hooper Dale, for the period of July 24, 1962 until April 10, 1967, ALAN D. MILLER, M.D., individually and as Commissioner of the New York State Department of Mental Hygiene, EDWARD PIOUS, individually and as Committee of the person and property of Rita Hooper Dale for the period of April 10, 1967 until the present, and LAWRENCE P. ROBERTS, M.D., individually and as Director of Harlem Valley State Hospital,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the Appellant to stay the mandate be and it hereby is denied.

J. EDWARD LUMBARD
J. Edward Lumbard

PAUL R. HAYS
Paul H. Hays

WM. H. TIMBERS
William H. Timbers
Circuit Judges

Appendix "F"

Opinion and Order of I. B. Cooper, U.S.D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

69 Civ. 3531

RITA HOOPER DALE, a former incompetent person,

Plaintiff,

against

DEMAREST J. HAHN, individually and as committee of the person and property of Rita Hooper Dale, for the period of July 24, 1962 until April 10, 1967; ALAN D. MILLER, M.D,. individually and as Commissioner of the New York State Department of Mental Hygiene; EDWARD PIOUS, individually and as committee of the person and property of Rita Hooper Dale for the period of April 10, 1967 until the present; and LAWRENCE P. ROBERTS, M.D., individually and as Director of Harlem Valley State Hospital,

Defendants.

APPEARANCES:

BRUCE J. ENNIS, Esq.,
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Appendix "F".

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SAMUEL A. HIRSHOWITZ, Esq.,
First Assistant Attorney General

IRVING L. ROLLINS, Esq.,
Assistant Attorney General
Of Counsel

IRVING BEN COOPER, D. J.

This is a purported class action by plaintiff Dale (1) for a declaratory judgment that section 102 of the Mental Hygiene Law of the State of New York (formerly § 1374 of the Civil Practice Act), which provides a procedure for the appointment of a committee for a patient of a state mental institution, denies plaintiff due process and the equal protection of the laws and invades her right to privacy, (2) for an injunction restraining further enforcement, operation or execution of the alleged unconstitutional statute, (3) for a return to plaintiff of all her moneys had and received. Plaintiff also seeks preliminary injunctive relief pursuant to 28 U.S.C. § 2284.

She now moves for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 and for a temporary restraining order returning to her the net balance of her

estate still in the hands of the committee. Applicant Escariz moves to intervene as a party plaintiff herein pursuant to Rule 24, F.R.Civ.P. Defendants move to dismiss the complaint pursuant to Rule 12(b)(1), (2) and (6), F.R.Civ.P.

FACTS

Plaintiff was committed to Harlem Valley State Hospital, Wingdale, New York in 1952 by order of certification of the New York Supreme Court, Bronx County, as a person afflicted with mental disease to such an extent that for her own welfare or the welfare of others, or of the community, she required care and treatment pursuant to former § 74 of the Mental Hygiene Law (since repealed). At no time during her confinement did plaintiff invoke the review procedure provided by former § 76 of the Mental Hygiene Law (now § 74). She expressly declares that she does not contest the validity of her commitment.

While she was a patient therein, defendant Roberts (the hospital director) petitioned the same New York Supreme Court for an order pursuant to C.P.A. § 1374 appointing a committee to manage her personal and business affairs. The verified petition stated that plaintiff had been legally committed to and was then an inmate of the Harlem Valley State Hospital of which Dr. Roberts was director, that plaintiff was then of unsound mind and incompetent to manage her person or property, that she was widowed and without known kin, and set forth the nature and extent of her known property.

Defendants provide us with a certified copy of a return of service filed with the Bronx County Supreme Court on July 22, 1962 stating personal service of the Petition and Notice of Motion was made upon plaintiff Dale as well as upon Dr. Roberts. The Notice of Motion served upon plaintiff stated that the motion to appoint a committee

would be heard in the Supreme Court, Bronx County, at 10:00 A.M. on July 24, 1962. Plaintiff's present complaint denies upon information and belief that plaintiff received such notice; no affidavit from plaintiff is submitted in support of that denial.

On July 24, 1962 the motion for appointment of a committee was granted by default in the court aforesaid on the basis of Dr. Roberts' petition. Defendant Hahn, now deceased, was appointed Committee of her person and property. The complaint alleges that Hahn, as plaintiff's committee, received approximately $9,283 for her account.

By order dated October 13, 1966 of the same court, Hahn was allowed to resign as Committee and move the judicial settlement of his account. A Guardian ad Litem, having been appointed by the Court on July 28, 1966 to protect the rights and interests of plaintiff on this accounting, filed a report and affidavit in her behalf in connection therewith. On April 10, 1967 the Court settled the final account of Hahn, discharged him as Committee and from any and all further liability once the payments directed by the Court were made, and ordered that defendant Pious be appointed Successor Committee of the person and property of plaintiff. The complaint alleges that Pious, as Successor Committee, received approximately $5,572 for plaintiff's account, representing the balance remaining after the disbursements ordered by the Court in the settlement of Hahn's account were made.

On April 18, 1967 plaintiff was discharged from Harlem Valley State Hospital. Thereafter, on motion of Pious and supporting affidavit of plaintiff, she was "declared competent to manage her person and her property" by order of the Supreme Court, Bronx County, dated December 13, 1968. This order authorized and directed Pious to file a final account of all of his proceedings from the date of his appointment and to move for the

judicial settlement thereof within thirty days, unless he restored to plaintiff her property after deducting proper charges and obtain a receipt and release therefor, in which event an application could be made ex parte for his discharge.

Pious, although willing to return plaintiff's property, has been unsuccessful in his efforts to obtain a receipt and release. On August 11, 1969, long after she was released and declared competent, plaintiff commenced this action. She states "for the record" that Pious is not charged "with any impropriety or individual wrongdong." See Letter of Bruce J. Ennis, Esq., January 29, 1970. The parties have agreed that Pious will proceed by April 6, 1970 to settle his account as plaintiff's committee in an appropriate state court to the end that the balance of her property still in the hands of the Committee will be restored to her as soon as possible. See Affidavit of Edward Pious, Esq., December 15, 1969, p. 4; Stipulation of the Parties, February 3, 1970, ¶ 3.

I *Three-Judge Court Requirements*

The single district judge before whom an application is made to convene a three-judge court must determine whether a substantial constitutional question has been raised with respect to the state statute, whether the complaint sets forth a basis for equitable relief and whether the other requirements for a three-judge court are met. See *Idlewild Liquor Corp.* v. *Epstein,* 370 U.S. 713 (1962); *Ex Parte Poresky,* 290 U.S. 30 (1933); *Green* v. *Board of Elections,* 380 F.2d 445 (2d Cir. 1967), cert. denied 389 U.S. 1048 (1968); *American Computers Assoc., Inc.* v. *Levitt,* 405 F.2d 1148 (2d Cir. 1969). If plaintiff fails to carry her burden in this regard, a three-judge court must be denied.

Appendix "F".

A Substantiality of the Constitutional Question

If the complaint fails to raise a substantial federal question with respect to a state statute, a three-judge court must be denied and the action dismissed. See *Swift & Co.* v. *Wickham,* 382 U.S. 111 (1965). The Supreme Court has stated that "[t]he lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this Court as to foreclose the subject." *California Water Service Co.* v. *City of Redding,* 304 U.S. 252, 255 (1938).

In rejecting the view "that except 'in an open and shut case,' it is better to 'constitute a 3-Judge Court, and allow that court to determine initially' whether it should have been constituted," our circuit has stated:

> "An occasional reversal because a court of appeals will disagree with respect to the substantiality of the question is far less wasteful of judicial resources . . . the best course for this circuit is for single district judges to continue conscientiously to pass upon the substantiality of constitutional attacks on state statutes . . . and, where this court unanimously agrees that the attack is without merit, for us not to be finical on whether the lack of merit was obvious." *Heaney et al.* v. *Allen et al.,* —— F.2d (2d Cir. slip opinion February 5, 1970) (citations omitted).

1. Due process

Plaintiff's contention that the appointment of a committee to manage property pursuant to the procedure provided by § 102 (and former § 1374 under which her committee was appointed) deprived her of the right to control

her property without due process of law, we find to be with-not substantial merit.

Notice and a judicial hearing before a court of law affording her an opportunity to be heard (she being a widow and the only known interested party) satisfies the essential requisites of due process and fundamental fairness.[1] See *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (prejudgment attachment); *Mullane* v. *Central Hanover Bank & Trust Co., Trustee,* 339 U.S. 306, 314 (1950); *Simon* v. *Craft,* 182 U.S. 427 (1901) (commitment to a mental institution); *Bradford Audio Corp.* v. *Pious,* 392 F.2d 67 (2d Cir. 1969). See also, *Anti Fascist Comm.* v. *McGrath,* 341 U.S. 123, 163 (1951) (Justice Frankfurter, concurring).

Here, a month in advance of the return day, plaintiff was, as we have already noted, given personal notice of the motion to appoint a committee, informed when and where it would be heard, and given an opportunity to register any objection. The allegation that no notice was received by plaintiff is made without a supporting affidavit or any other evidentiary support and fails to raise a genuine issue in this regard. No opposition having been registered by plaintiff, the motion to appoint a committee was granted by default. In the absence of any objection, there was no occasion for the court to inquire beyond the allegation of the petition that plaintiff was of unsound mind and incompetent to manage her person or property.

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[1] We do not believe that a person who has been judicially committed to a state institution, as was plaintiff, with the opportunity afforded her of a jury determination of the need for her confinement, which commitment procedure plaintiff concedes to fully comply with the requirements of due process, must be furnished counsel and the right to a jury trial in order to meet the essentials of due process in the appointment of a committee to care for and manage her property. See, *e.g.*, *Sporza* v. *German Savings Bank,* 192 N.Y. 8, 18-22 (1908).

Plaintiff further contends that controlling New York authority interprets sections 102 and 1374 to "permit the inference" that involuntary commitment is equivalent to incompetence and inability to manage business affairs; that such questions are in fact legally and medically dissimilar; and that as a result these sections improperly shift to the patient the risk of non-persuasion in a subsequent proceeding to show competency to handle business affairs. This argument lacks merit in light of the notice and opportunity afforded plaintiff at the initial hearing. Compare *Armstrong* v. *Manzo*, 380 U.S. 545 (1965).

Treating the above as an argument that the New York courts have created a presumption of incompetency upon a showing of involuntary commitment which may violate due process, we find no merit to such contention. In *Leary* v. *United States*, 395 U.S. 6, 32-36 (1969), the Supreme Court held that the controlling test for determining the constitutional validity of a statutory presumption (or of a permissible "inference" as plaintiff alleges) is whether there is a "rational connection between the facts proved and the fact presumed." See also, *Mobile, J & K. C. R. Co.* v. *Turnispeed*, 219 U.S. 35 (1910).

We believe it clear that an inference of inability to adequately conduct personal or business affairs from an adjudication of mental illness presently requiring care and treatment cannot be said to be "arbitrary because of lack of connection between the two in common experience." *Leary* v. *United States, supra* at 33. We are satisfied, and plaintiff does not contend to the contrary, that "it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Id.* at 36.

Although not asserted by plaintiff, a line of New York authority indicates that the court may consider the adjudication of mental illness requiring involuntary commitment conclusive on the question of incompetency for

purposes of appointing a committee to manage and conserve the patient's property in her behalf.[2] See *Sporza* v. *German Savings Bank,* 192 N.Y. 8, 19 (1908); *In Re Walker,* 57 App. Div. 1 (4th Dept. 1900); *Martello* v. *Cagliostro,* 202 N.Y.S. 703, 707-709 (S. Ct. 1924); *Application of Brown,* 46 N.Y.S. 2d 575, 581-83 (S. Ct. 1944), rev'd on other grounds, 50 N.Y.S. 2d 783 (1945); *In Re Stearns,* 59 N.Y.S. 2d 103, 106 (S. Ct. 1945). But see *Finch* v. *Goldstein,* 245 N.Y. 300, 303-305 (1927); *Hoff* v. *New York,* 279 N.Y. 490, 494 (1939); *Quarterman* v. *Quarterman,* 179 Misc. 759, 760 (S. Ct. 1943). Assuming arguendo that such cases correctly state the present New York practice, plaintiff might argue that such a conclusive presumption would violate due process. See *United States* v. *Bowen,* 414 F.2d 1268, 1274-80 (3rd Cir. 1969).

Plaintiff, however, by virtue of her failure to assert her competency, despite the notice afforded her, at the proceeding to appoint a committee, lacks standing to assert this possible violation of due process. Moreover, such a presumption is permitted on the ground that lawful commitment adjudicating that a person is mentally ill "to such an extent that for his own welfare or the welfare of others, or of the community, he requires care and treatment" makes her a ward of the state, with not only person but property placed in the custody of the State. See *Sporza* v. *German Savings Bank, supra.*

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[2] Adjudication of incompetency does not foreclose plaintiff's competency to act in her own behalf in matters affecting her personal status; rather, the conclusiveness of such adjucation appears confined to business affairs and the power to contract. See *e.g., Matter of Buttonow,* 23 N.Y.S. 2d 385, 395 (1968). Where there is no committee, or where the matter is one in which the committee has no power to act on behalf of the person, the involuntary patient's acts are voidable at his election, rather than void. See *Id.; Finch* v. *Goldstein,* 245 N.Y. 300, 303 (1927); *Weinberg* v. *Weinberg,* 255 App. Div. 366 (4th Cir. 1938).

Appendix "F".

Conceding, as plaintiff does, that the initial commitment procedure affords full due process, this procedure to appoint a committee did not deprive her of due process of law. Compare *United States* v. *Bowen, supra.* As the New York Court of Appeals held in *Sporza* v. *German Savings Bank, supra* at 19:

> "If she had been adjudged to be insane, then she has been deprived of no constitutional right; for, being an insane person, she had become a ward of the Supreme Court, which had succeeded to the powers of the chancellor, and the custody of her person and property became subject to the management of the court through its specified agents appointed for that purpose. She is not deprived of her liberty or property without due process of law, for, as we have seen, she has been duly committed in accordance with the provisions of the statute upon an order of the court. She is not deprived of her property, for the court undertakes its care and management in her behalf and for her benefit."

Plaintiff next alleges that her right to control her property is a "fundamental personal liberty" and that no deprivation of that right is constitutionally acceptable if there are "less drastic alternatives."

Applications of this principle as a mandate of due process are narrowly confined to situations in which First Amendment freedoms are involved or the exercise of basic rights are penalized. See *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Ketyeshian* v. *Board of Regents,* 385 U.S. 589 (1967); *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964); *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *United States* v. *Jackson,* 390 U.S. 570 (1968). This has no application to the case before us.

Appendix "F".

Plaintiff finally asserts that sections 1374 and 102 are void on their face because they authorize appointment of a committee without notice or hearing in the discretion of the court.[3] Assuming such notice and hearing are constitutionally required and not sufficiently met by the adjudication of insanity which makes the patient a ward of the State, and assuming further that notice and hearing are not in fact always given, nevertheless, plaintiff, having been afforded notice and registering no objection to the appointment of the committee, lacks standing to raise his argument. See *United States* v. *Raines,* 362 U.S. 17, 21-22 (1960). The fact this is a purported class action does not by itself afford her standing. This is not a question involving vagueness or overbreadth, nor does this involve First Amendment rights. We are not here faced with the possibility of a "chilling effect" on future exercise of such rights by others. Accordingly, no exception to the usual rule that plaintiff has no standing to raise this contention is warranted. Compare *Dombrowski* v. *Pfister,* 380 U.S. 479, 486-87 (1965).

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[3] "§ 1374

4. Notice . . . shall be personally given to such person . . . unless sufficient reasons for dispensing therewith are set forth in the petition or shown by affidavit.

5. Upon the presentation of such petition and proof of service of such notice, the court or justice, if satisfied of the truth of the facts required . . ., may appoint a committee . . . or may require any further proof which it or he may deem necessary before making such appointment."

"§ 102

(3) Notice. Unless the court orders otherwise, notice of petition shall be served upon the patient. . . .

(5) Order. The court if satisfied of the truth of the facts stated in the petition may appoint a committee without trial or hold the matter for further proceedings."

Appendix "F".

2. Equal protection

Plaintiff contends that sections 1374 and 102 deprived her of property without equal protection of the laws as required by the Fourteenth Amendment. We believe this contention is also without sufficient merit.

Section 1374 and 102 require neither a statement of facts in the petition showing incompetence nor a trial by jury on the issue of competence, elements required by Mental Hygiene Law § 101 for declaration of incompetency and appointment of a committee generally. Here, however, unlike *Baxtrom* v. *Herold,* 383 U.S. 107, 111 (1966) on which plaintiff relies, the "distinction made [does] have some relevance to the purpose for which the classification is made." Compare *United States ex rel. Shuster* v. *Herold,* 410 F.2d 1071 (2d Cir. 1969).

The class which is differentiated for the more summary procedure and to which plaintiff belonged is limited to those persons involuntarily committed[4] to a state mental institution. Clearly the state has a reasonable basis for treating persons judicially found to be so mentally ill as to require care and treatment differently from those who have not been so adjudicated (non-patients and voluntary patients) when devising procedures for determining mental competency and the appointment of committees. Further, the State may rationally conclude that the relatively inexpensive and less-traumatic but also less-protective procedure provided for by sections 1374 and 102 should be restricted to those involuntary patients over whom the State has direct control. By limiting its application to involuntary patients in a state mental hospital where a petition is filed by the director of such hospital,

[4] Voluntary patients come within § 102 only if they consent to such procedure. In the absence of such consent, § 101 is applicable.

any danger that the motivation for the petition may come from private interests in conflict with the patient's best interest is minimized since the hospital director is independent and an agent of the State.

Plaintiff further contends that the burden on the State is to show not only that its classification is reasonable, but that the distinction is made necessary by some "compelling" state interest. This added burden has been required of the state only in cases involving suspect classifications (such as race) or basic civil rights generally derived from the First Amendment. See *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Harper* v. *Virginia State Bd. of Elections,* 383 U.S. 663 (1966); *Korematsu* v. *United States,* 323 U.S. 214 (1944); *Loving* v. *Virginia,* 388 U.S. 1 (1967); *McLaughlin* v. *Florida,* 379 U.S. 184 (1964). There is no invidious discrimination present here. Compare *Levy* v. *Louisiana,* 391 U.S. 68 (1968); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942). This case does not call for the application of that unusual and strict standard of equal protection of the laws.

3. Right to privacy

Plaintiff's argument in this regard, as we see it, is that before one's right to be let alone, to personal security, in sum to privacy, can be infringed the state must show a compelling justification for its action and that no less restrictive alternatives are available. While this principle has significant areas of applicability, we find it inapposite here. Compare *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Stanley* v. *Georgia,* 394 U.S. 557. See also *Camara* v. *Municipal Court,* 387 U.S. 523 (1966). There is no undue government intervention in either the procedure or the substance of the appointment of a committee for involuntary state mental patients in New York.

4. Lack of a sufficiently substantial federal question

On the basis of the foregoing, we conclude that plaintiff has failed to meet her burden of establishing a substantial constitutional question meriting the convening of a three-judge court. For this reason alone, defendants' motion to dismiss this action must be granted.

B. Further Bases to Deny a Three-Judge Court and Dismiss

Plaintiff's application for a three-judge court must be denied and defendants' motion to dismiss granted for at least two other reasons. First, her complaint asserts no cause of action cognizable under 42 U.S.C. § 1983. Second, she lacks standing to enjoin the further appointment of committees pursuant to section 102; has no reasonable expectation of obtaining injunctive relief against her committee; and is barred by defendants' official immunity from recovering the damages alleged.

1. No cause of action under Civil Rights Act

Plaintiff's claim for relief is brought under the Civil Rights Act, 42 U.S.C. § 1983, for deprivation of rights secured to her by the Fourteenth Amendment. Jurisdiction is based on the Civil Rights jurisdictional statute, 28 U.S.C. § 1343 (3) and (4).

We believe the decision of our circuit in *Bradford Audio Corp.* v. *Pious,* 392 F.2d 67, 72 (2d Cir. 1968), is controlling and establishes that, assuming plaintiffs present a substantial question, they have no cause of action under § 1983:

> "To qualify under § 1983 the right sought to be enforced must in the main be one incapable of pecuniary evaluation, such as personal liberty, unrelated to and not dependent upon an invasion or deprivation of

property interests. A suit for the enforcement of such civil rights will, however, not necessarily be removed from the scope of § 1983 because their enforcement may possibly affect property interests where those interests are incidental or ancillary to the basic personal right. *It may be argued in the present case the appellant has endeavored to assert an unlawful interference with its own money or bank account but, even if this could be found to be so, the freedom can only be claimed to be impaired or lost when there has been an infringement of a property right—in this case the alleged unlawful seizure of the money. As the loss of freedom derives from and is dependent for its exercise upon the infringement of the property right the action is not within the jurisdiction of § 1983."*
(emphasis added; citations omitted).

Plaintiff offers to amend her complaint to base jurisdiction upon federal question, 28 U.S.C. § 1331(a), contending she can meet the $10,000 amount in controversy requirement. This amendment would not, however, cure the absence of a cause of action under § 1983. In the *Bradford* case itself over $10,000 was involved and jurisdiction had been based on both 28 U.S.C. §§ 1331(a) and 1343(3) and (4), yet the absence of a cause of action under § 1983 was held fatal. See *Bradford Audio Corp.* v. *Pious, supra* at 69.

2. Right to the injunctive relief sought

a. appointment of committees under section 102

Plaintiff has been released from the Harlem Valley State Hospital and judicially declared competent. Any prospect that Mental Hygiene Law § 102 might again be employed to appoint a committee for plaintiff on some future occasion would require that plaintiff first be an involuntary patient again at a state mental hospital. It is "wholly

conjectural that another occasion might arise" when the appointment procedure of § 102 would be invoked as to plaintiff. See *Golden* v. *Zwickler*, 394 U.S. 113, 119 (1969). Compare *Fhagen* v. *Miller*, 306 F.Supp. 634, 636-37 (S.D. N.Y. 1969). Plaintiff's stake in the further applicability of the appointment procedure of this section is not sufficiently immediate to accord her a basis for equitable relief enjoining appointment of committees pursuant to § 102.[5] See *Linehan* v. *Waterfront Comm'n of N.Y. Harbor*, 116 F.Supp. 401, 404-405 (S.D.N.Y. 1953); *Hill* v. *Nelson*, 272 F.Supp. 799 (N.D. Cal. 1967). See also, "Developments in the Law—Injunctions," 78 Harv. L. Rev. 994, 1074-75 (1965).

Lacking any need to enjoin the further appointment of committees in her own behalf, plaintiff lacks standing to sue on behalf of the class of patients presently involuntarily committed to a state institution whom she purports to represent. While that class would have a sufficiently immediate interest in obtaining injunctive relief against the § 102 procedure, plaintiff may not represent a class of which she is no longer a member (at least where as here her membership had ceased before this suit was instituted) and, thus, may not in this suit invoke their rights. See 3B Moore, Federal Practice ¶¶ 23.04 and 23.10-1 (1969). See also, *Carroll* v. *Associated Musicians of N.Y.*, 316 F.2d 574, 576 (2d Cir. 1963); *Lamont* v. *Postmaster General of the United States*, 229 F.Supp. 913, 920-21 (S.D.N.Y. 1964), rev'd on other grounds, 381 U.S. 301 (1965). Compare *Norwalk Core* v. *Norwalk Redevelopment Agency*, 395 F.2d 920 (2d Cir. 1968) (according an association the right to represent a class although not a member thereof). This is not an issue evading effective review with no readily

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[5] We do not intimate that plaintiff's suit is moot in the sense that no actual controversy exists. See *Evers* v. *Dwyer*, 358 U.S. 202 (1958).

apparent class having sufficient standing to challenge the constitutionality of the § 102 procedure. Compare *Fhagen* v. *Miller, supra.*

b. operation of present committee

Apart from enjoining the appointment of further committees plaintiff seeks to enjoin Pious from continuing to operate as her committee.[6] While this controversy appears clearly justiciable (the committeeship not yet terminated), we believe it equally clear that plaintiff has no need of such equitable relief, and, thus, no need for a three-judge court. See *Linehan* v. *Waterfront Comm'n of N.Y. Harbor, supra; Hill* v. *Nelson, supra.* "Developments in the Law—Injunctions," 78 Harv. L. Rev. 994, 1074-75 (1965).

Section 102(6) provides that upon release of a patient and a determination that he is presently able to adequately conduct his affairs, the committeeship shall be terminated and the person's property restored.[7] See also, 18 Carmody-

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[6] The parties on February 3, 1970 stipulated to drop Pious as a defendant in this action in the event he should prove unnecessary to plaintiff's standing to sue or to this Court's jurisdiction. In view of our determination that plaintiff may not enjoin the further appointment of committees, Pious' presence becomes necessary since any remaining hope for injunctive relief must run as to him. Accordingly, our analysis proceeds on the assumption that Pious remains a defendant herein.

[7] § 102(6) provides:

"Upon release of the patient from the institution, the director of the institution shall give written notice of such release to the committee. The committee of the patient upon receiving such notice and a certificate from the director to the effect that such person is presently able adequately to conduct his personal and business affairs, shall render his final accounting, unless waived, to the court which appointed him and shall apply for his discharge as such committee and for an order directing the restoration of the patient's property to such patient."

Wait 2d § 109:126 (1967); 27 N.Y. Jur. "Incompetent Persons" § 15 (1963).

In the instant case, Pious moved the Supreme Court, Bronx County, to declare plaintiff competent and on December 13, 1968 the motion was granted. She is presently managing her property except as to that entrusted to the Committee. As to such property so entrusted, that Court in its same order directed Pious to file a final account and to move for the judicial settlement thereof. The parties have agreed among themselves that Pious shall within a month move the judicial settlement of his account. Except for such final accounting, nothing further remains to be done by Pious.

As we see it, plaintiff has an adequate remedy at law in the state courts which the parties have agreed to pursue. Any injunctive relief that might be fashioned by a three-judge court could afford plaintiff no further or speedier remedy. Termination of the committeeship forthwith is not resisted by defendants and is mandated by state law and the order of the Supreme Court, Bronx County.

With regard to enjoining committees presently outstanding, plaintiff again purports to represent a relevant class comprised of all those who have committees appointed pursuant to § 102. For reasons already set forth in the preceding section, plaintiff may not represent those persons whose rights and defenses differ materially from her own. As to the class of persons released from the institution and declared competent whom she might fairly represent, their need for equitable relief is wholly speculative. In any event, with only plaintiff's committee before us, we see no basis on which an effective equitable decree in favor of this class might be fashioned.

Accordingly, as there is no basis for any reasonable expectation that equitable relief (as required by 28 U.S.C. § 2281 for the convening of a three-judge court) might be

forthcoming, the application to convene such court must be denied. See *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 154-155 (1963); *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U.S. 243, 250 (1938); *Nationwide Mutual Insurance Co.* v. *Vaage*, 265 F.Supp. 556, 562-63 (S.D. N.Y. 1967).

3. Immunity

In addition to seeking declaratory and injunctive relief, plaintiff seeks to recover money had and received by defendants herein. No claim of any wrongdoing, intentional or negligent, on the part of defendants is alleged in her complaint. We believe this portion of her action is barred by the doctrine of official immunity.[8]

Pious as a quasi-judicial officer responsible to the New York Supreme Court for his conduct as plaintiff's committee,[9] is within the protection of the common law immunities. Plaintiff's express acknowledgment that Pious is charged with no wrongdoing along with the absence of any such allegation in the complaint establish that Pious "played [no] part except that imposed upon him by his official position." See *Fanale* v. *Sheehy*, 385 F.2d 866, 868 (2d Cir. 1967). He is accordingly immune from suit for money had and received. See *Bradford Audio Corp.* v. *Pious*, 392 F.2d at 72-73.

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[8] We recogniez that the limits of official immunity in the context of the Civil Rights Laws is far from certain. Compare *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Bradford Audio Corp.* v *Pious*, 392 F.2d 67, 72-73 (2d Cir. 1968); *Kletschka* v. *Driver*, 411 F.2d 436, 449 (2d Cir. 1969); *Franklin* v. *Meredith*, 386 F.2d 958, 961 (10th Cir. 1967); *Birnbaum* v. *Trussell*, 347 F.2d 86, 88-89 (2d Cir. 1965); *Jobson* v. *Henne*, 355 F.2d 129 (2d Cir. 1966).

[9] See Mental Hygiene Law §§ 106, 110-113. See also, 27 N.Y. Jur. "Incompetent Persons" §§ 65-67.

Appendix "F".

Drs. Roberts and Miller are also in our opinion immune from suit by virtue of their official immunity. We believe the position of the doctors in this case is much more similar to *Francis* v. *Lyman*, 216 F.2d 583 (1st Cir. 1954) than to *Jobson* v. *Henne*, 355 F.2d 129 (2d Cir. 1966). See *Franklin* v. *Meredith*, 386 F.2d 958, 960-61 and n. 8 (10th Cir. 1967); *Bradford Audio Corp.* v. *Pious, supra* at 72-73. No wrongdoing, carelessness or absence of good faith is alleged. The petitioning of the New York Supreme Court to appoint a committee is expressly provided for by section 102 of the New York Mental Hygiene Law. "Thus the alleged act is not only an act of discretion on the part of the superintendent of the state hospital . . . but is an act expressly provided for and authorized by [New York] law." *Franklin* v. *Meredith*, 386 F.2d 958, 961 (10th Cir. 1967). See also, *Francis* v. *Lyman*, 216 F.2d 583, 585 (1st Cir. 1954).

II *Motion to Intervene*

The motion of plaintiff-applicant Escariz to intervene herein pursuant to Rule 24, F.R.Civ.P., is denied. The papers before us do not indicate that he has a committee outstanding and reflect that he, like Dale, has been released from the institution and declared competent. Since the present action must be dismissed, no basis for intervention exists.

III *Conclusion*

For the reasons set forth above, plaintiff's application to convene a three-judge court is denied; defendants' motion to dismiss the complaint is granted; the motion to intervene is denied.

Appendix "F".

This shall be considered an order; settlement thereof is unnecessary.

So Ordered:

New York, N.Y.
March 26, 1970

Irving Ben Cooper
United States District Judge

Appendix "G"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 169—September Term, 1970.

(Argued November 10, 1970 Decided February 19, 1971.)

Docket No. 35059

RITA HOOPER DALE, a former incompetent person,

Plaintiff-Appellant,

v.

DEMAREST J. HAHN, individually and as committee of the person and property of Rita Hooper Dale, for the period of July 24, 1962 until April 10, 1967; ALAN D. MILLER, M.D., individually and as Commissioner of the New York State Department of Mental Hygiene; EDWARD PIOUS, individually and as committee of the person and property of Rita Hooper Dale for the period of April 10, 1967 until the present; and LAWRENCE P. ROBERTS, M.D., individually and as Director of Harlem Valley State Hospital,

Defendants-Appellees.

Before:

LUMBARD, *Chief Judge*, and
WATERMAN and ANDERSON, *Circuit Judges*.

Appeal from a judgment of the United States District Court for the Southern District of New York, Cooper, *J.*, dismissing plaintiff's complaint that § 102 of New York's Mental Hygiene Law, relating to the appointment of com-

mittees to manage the affairs of incompetent persons, is unconstitutional, and denying plaintiff's motion for the convening of a three-judge district court.

Affirmed in part, reversed in part, and remanded.

BRUCE J. ENNIS, JONATHAN WEISS, MARK WURM, New York City, *for Plaintiff-Appellant.*

IRVING L. ROLLINS, Asst. Attorney General; SAMUEL A. HIRSHOWITZ, First Asst. Attorney General; LOUIS J. LEFKOWITZ, Attorney General of New York, *for Defendants-Appellees Miller and Roberts.*

WATERMAN, *Circuit Judge:*

In 1951 plaintiff Rita Dale was involuntarily committed to Harlem Valley State Hospital in Wingdale, New York. She contends that she was committed as an alcoholic while the defendants contend that she was committed as a mental incompetent. In 1962, allegedly in order to facilitate payment to the New York Department of Mental Hygiene of amounts claimed to be due for services and treatment rendered to plaintiff, the hospital director, defendant Roberts, petitioned a state court for an order under § 1374 of New York Civil Practice Law and Rules (now § 102 of New York's Mental Hygiene Law) declaring plaintiff to be incompetent and appointing a committee to handle her affairs. Plaintiff alleges that she did not receive personal notice of that petition, and also that she was not given an opportunity to retain counsel, to appear and be heard in opposition to the petition, and to have a jury trial. Sections 1374 and 102 do not require any of the above procedures, which have been associated with due process, as a matter of right. The petition was granted without a hearing, and defendant Hahn was appointed as the committee. On April 10, 1967, defendant Pious was appointed

as the successor committee. Again, plaintiff allegedly received no notice of the proceeding and was given no opportunity to be heard. On April 18, 1967 plaintiff was discharged. Thereafter she was declared competent, and is now gainfully employed.

The committees, during their existence, disbursed $7,992.92 of plaintiff's assets, $5,668.16 to the Department of Mental Hygiene and $2,306.76 for expenses incurred by the committees in their operation. There remained, after an accounting, $6,863.18 of the principal and interest, which amount is being used by plaintiff, now 69, apparently as a supplement to her earnings.

In her amended complaint plaintiff purports to set up a class action, seeks the convening of a three-judge court, prays for a declaratory judgment that § 102 is unconstitutional and for temporary and permanent injunctions against the implementation of § 102 and any action by all existing committees and demands the return of all moneys had and received by defendants either as or through plaintiff's committees. Jurisdiction is alleged under 28 U.S.C. § 1343(3) and (4) and 42 U.S.C. § 1983. Also, one Antonio Escariz has moved to intervene as a named plaintiff. The case against defendant Pious was dismissed by stipulation. Relying upon multiple grounds the district court below granted the motion of the remaining defendants to dismiss under Rule 12(b), and it is from this last decision that plaintiff appeals. We disagree with the dispositive points upon which the result below was based and we reverse the judgment entered in the district court.

The district court held that *Bradford Audio Corp.* v. *Pious*, 392 F.2d 67, 72 (2 Cir. 1968), was controlling on the question of jurisdiction under the Civil Rights Act because it considered that plaintiff's complaint primarily concerned the infringement of a property right.[1] We deem *Escalera* v. *New York City Housing Authority*, 425 F.2d 853, 864

(2 Cir.), *cert. denied,* 91 S. Ct. 54 (1970), and *Birnbaum* v. *Trussell,* 371 F.2d 672 (2 Cir. 1966), to be more analogous. At stake in the petition to appoint plaintiff's committee was plaintiff's right to enter into legal relations, to control and dispose of property, to enter into contracts, and to sue and be sued—in short, at stake were all the incidents of being a competent individual which are lost when one is declared to be incompetent. Although the plaintiff requests recovery of money alleged to have been illegally spent by the committee, any right she may have to the money is not the critical interest sought to be protected. The important ones are, rather, those affected by the declaration that she was incompetent to handle her own affairs. The stigma of incompetency, the implication that she has some kind of mental deficiency, with attendant untrustworthiness and irresponsibility, and the consequences to her reputation and her normal human relationships with others in her community involve more than a property right, *Wisconsin* v. *Constantineau,* Docket No. 95, Supreme Court of the United States, decided January 19, 1971, and are sufficient to support jurisdiction under § 1343. See *Birnbaum* v. *Trussell, supra.* Unlike the claim in *Bradford Audio Corp.* v. *Pious,* 392 F.2d 67 (2 Cir. 1968), the adverse impact of the officials' action on her rights of personal liberty would exist regardless of the alleged illegal use of the money. We hold that plaintiff has stated a cause of action under 42 U.S.C. § 1983.[2]

The district court also ruled that, as plaintiff has made no allegations of wrongdoing, carelessness or lack of good faith by the defendants, the defendants are immune from suit for damages. The district court recognized, as we also

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[1] See also *Eisen* v. *Eastman,* 421 F.2d 560 (2 Cir. 1969).

[2] The district court also rejected plaintiff's alternative contention that jurisdiction was proper under 28 U.S.C. § 1331(a). Because we find jurisdiction under the Civil Rights Act, we do not reach the issue of whether this rejection was erroneous.

do, that "the limits of official immunity in the context of the Civil Rights Laws is far from certain."[3] It is settled that judicial[4] and legislative[5] officers enjoy at least a qualified immunity from suit. Likewise, prosecutors,[6] and, in some instances, policemen,[7] enjoy a similar immunity. However, as stated in *Birnbaum* v. *Trussell*, 347 F.2d 86, 88-89 (2 Cir. 1955):

> A showing that defendants acted "within the scope of their employment and authority" is not sufficient to defeat the district court's jurisdiction. It would nullify the whole purpose of the civil rights statutes to permit all governmental officers to resort to the doctrine of official immunity. The statutory condition of defend-

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[3] *Dale* v. *Hahn*, 311 F. Supp. 1293, 1305 n. 8 (SDNY 1970). The court cited *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Bradford Audio Corp.* v. *Pious*, 392 F.2d 67, 72-73 (2 Cir. 1968); *Kletschka* v. *Driver*, 411 F.2d 436, 449 (2 Cir. 1969); *Franklin* v. *Meredith*, 386 F.2d 958, 961 (10 Cir. 1967); *Birnbaum* v. *Trussell*, 347 F.2d 86, 88-89 (2 Cir. 1965); *Jobson* v. *Henne*, 355 F.2d 129 (2 Cir. 1966).

[4] See, e.g., *Dacey* v. *New York County Lawyers' Ass'n*, 423 F.2d 188, 191-192 (2 Cir. 1969), cert. denied, 90 S. Ct. 1819 (1970); *Kenney* v. *Fox*, 232 F.2d 288 (6 Cir.), cert. denied sub nom. *Kenney* v. *Killian* and *Kenney* v. *Hatfield*, 352 U.S. 855, 856 (1956); *Silver* v. *Dickson*, 403 F.2d 642 (9 Cir. 1968), cert. denied, 394 U.S. 990 (1969). The usual qualification is that the officer be acting in good faith within his authority. However, many judicial officers have absolute immunity regardless of any lack of good faith.

[5] See, e.g., *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *Lynch* v. *Johnson*, 420 F.2d 818, 821 (6 Cir. 1970). See text of footnote 4, *supra*.

[6] See, e.g., *Wilhelm* v. *Turner*, 431 F.2d 177, 180-183 (8 Cir. 1970); *Peck* v. *Mitchell*, 419 F.2d 575, 578 (6 Cir. 1970); *Kauffman* v. *Moss*, 420 F.2d 1270 (3 Cir. 1970); *Fanale* v. *Sheehy*, 385 F.2d 866 (2 Cir. 1967).

[7] See *Pierson* v. *Ray*, 386 U.S. 547, 557-558 (1967); cf. *Monroe* v. *Pape*, 365 U.S. 167 (1961).

> ant's acting "under color" of state or territorial law contemplates that he act in an official capacity. To the extent that state or municipal officers . . . violate or conspire to violate constitutional and federal rights, the Civil Rights Laws . . . abrogate the doctrine of official immunity. See The Doctrine of Official Immunity Under the Civil Rights Acts, 68 Harv. L. Rev. 1229 (1955).

See also *Jobson* v. *Henne,* 355 F.2d 129, 133-134 (2 Cir. 1966). Thus it is apparent that there are competing considerations which must be balanced in deciding whether particular defendants are totally immune from liability and the limits of any qualified immunity. As announced by this court in *Kletschka* v. *Driver,* 411 F.2d 436, 448 (2 Cir. 1969):

> Even if New York law does grant defendants immunity this would not be binding on a federal court in an action brought under § 1983. Rather the court must determine under the facts presented whether the policy of liability reflected in the Act requires that the local rule of immunity be overridden, or whether under the circumstances the local rule must be followed to avoid too great an interference with the efficient operation of state government. See Birnbaum v. Trussell, 347 F.2d 86, 88-89 (2d Cir. 1965); cf. Alva Steamship Co. v. City of New York, 405 F.2d 962, 969-971 (2d Cir. 1969). *See generally* Note, Section 1983: A Civil Remedy for the Protection of Federal Rights, 39 N.Y.U.L. Rev. 838, 852-854 (1964).

However, in balancing the competing considerations, we follow this court's previous counsel that "the defense of official immunity should be applied sparingly in suits brought under § 1983." *Jobson* v. *Henne, supra,* at 133-134. We note here that the defendant Roberts was under no

official compulsion to seek the appointment of a committee and that § 102 does not preclude the safeguards which plaintiff contends are constitutionally required. Also, plaintiff does not seek damages beyond the return of those moneys, plus interest, which were expended by the committees. While we do not intimate any opinion as to defendants' immunity in a case where consequential or punitive damages are sought, we do hold that the defendants are not immune from suit for compensatory damages to the extent that they have expended plaintiff's assets.[8] This lack of immunity should not seriously hamper the diligent administration of New York's Mental Hygiene Law, the latter factor being a consideration which in our estimation does not outweight the policy of the Civil Rights Acts.

The main thrust in the district court's opinion is the court's belief that plaintiff had failed to raise a substantial constitutional question. The primary support for this holding was the finding, based on affidavits submitted by the defendants, that plaintiff, contrary to her claim, had indeed received personal notice of the petition to appoint a committee to handle her affairs. While Rule 12(b), F.R. Civ. P., provides that a motion under Rule 12(b)(6) may be treated as a motion for summary judgment under Rule 56, it also provides that "all parties shall be given reasonable opportunity to present all material made pertinent to such a

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[8] Hence, if plaintiff succeeds in her challenge to the appointment of her committees, she will be entitled to reimbursement from defendants for the expenses charged against her assets through the operation of the committees. However, as to the amounts paid to the Department of Mental Hygiene for services rendered by that Department, recovery should be disallowed to avoid multiple litigation. Plaintiff was liable for these latter amounts irrespective of the appointment of the committees; and the accounting in the state courts, at which plaintiff was fully represented, is *res judicata* as to these amounts.

motion by Rule 56." It seems fair to include within the term "reasonable opportunity" some indication by the court to "all parties" that it is treating the 12(b)(6) motion as a motion for summary judgment. *Costen* v. *Pauline's Sportswear, Inc.*, 391 F.2d 81, 85 & n. 5 (9 Cir. 1968); 2A Moore, Federal Practice, ¶ 12.09, 2300-02 & nn. 23 & 25. Here, the district judge gave no indication that he was going to consider anything but the pleadings,[9] plaintiff filed no counter-affidavit, and the factual issue of whether she received notice was resolved against her on defendants' affidavits alone. This was error.

In addition, without going into the merits of plaintiff's challenge to § 102, we cannot say that even if plaintiff had personally received notice of the appointment petition such receipt would automatically resolve the constitutional issue. Because of a mental hospital inmate's alleged condition, it may well be that personal notice to the inmate is insufficient and that independent guardians *ad litem*[10] should be appointed in all cases for such inmates. While we do not decide this issue now, we consider it substantial enough to require the consideration of a three-judge district court

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[9] Indeed, the district court's opinion, 311 F. Supp. 1293, also makes no mention of the possibility that defendants' motion was being treated as a motion for summary judgment.

[10] See footnote 13, *infra*, and accompanying text. "Independent" would connote lack of connection with the hospital administration. In this regard, we view with skepticism appellees' apparently serious contention that service upon defendant Roberts, as plaintiff's custodian while in the hospital, was sufficient even if plaintiff did not receive personal notice. As Dr. Roberts was the originator of the petition for the appointment of a committee, it defies credulity that defendants would expect us to hold that he, the petitioner, could be, at the same time and in the proceeding he initiated, the person likely to insure adequate protection of plaintiff's interests.

if the other prerequisites to the convening of such a court are met.[11]

Defendants argue that, inasmuch as the initial commitment proceedings provided due process safeguards, the state as *parens patriae* had complete control over plaintiff after that commitment, and the state could treat her and her affairs as it thought proper. This argument contains an overbroad characterization of the state's power as *parens patriae*.[12] Moreover, it overlooks well-established New York law that different issues are to be resolved on a petition to appoint a committee than those resolved at the initial commitment proceeding. As stated in *In re*

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[11] The present appeal also raises the issue of whether a single judge, when faced with a request to convene a three-judge court, can resolve pertinent factual issues relative to that request by use of the summary judgment procedure. Although a single judge has the duty to determine whether the constitutional issues are frivolous or are obviously without merit, *Green* v. *Board of Elections*, 380 F.2d 445, 448 (2 Cir. 1967), cert. denied, 389 U.S. 1048 (1968), it would seem that a single judge cannot delve deeper than the face of the pleadings in reaching this determination. *Ex parte Poresky*, 290 U.S. 30, 32 (1933), rehearing denied, 366 U.S. 922 (1961); *Local U. No. 300, Amal. Meat Cutters & B. Work.* v. *McCulloch*, 428 F.2d 396, 399-400 (5 Cir. 1970); cf. *Hargrave* v. *McKinney*, 413 F.2d 320, 324 (5 Cir. 1969); *Fort* v. *Daley*, 431 F.2d 1128, 1131-1132 (7 Cir. 1970); compare 28 U.S.C. § 2284(5). However, it is not clear whether the district court actually granted summary judgment in this case and our decision rests on the grounds that it was improper for the district court to consider the affidavits defendants submitted in support of their motion to dismiss and that resolution of the issues relative to notice still leaves a substantial constitutional question to be adjudicated.

[12] See the application of the doctrine of *parens patriae* to juvenile proceedings as discussed in *Application of Gault*, 387 U.S. 1, 14-19 (1967).

Lugo's Guardianship, 172 N.Y.S.2d 104, 108 (Court of Claims 1958):[13]

> Commitment under the insanity laws does not change the status of the subject from competent to incompetent. He is known merely as an alleged incompetent.

See also *Finch* v. *Goldstein,* 245 N.Y. 300, 303 (1927); *Hoff* v. *New York,* 279 N.Y. 490, 494 (1939); *Griffin* v. *New York Life Insurance Co.,* 272 App. Div. 939, 72 N.Y.S.2d 50 (2d Dept. 1947). Thus it is clear that different rights of an alleged incompetent are at stake in a proceeding to appoint a committee, rights which were not the subject of controversy in the initial commitment proceedings.[14] While we leave to further proceedings below the resolution of issues arising from inquiry as to whether plaintiff was afforded adequate procedural safeguards to these rights under

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[13] Rev'd, 8 A.D.2d 877, 187 N.Y.S.2d 59 (3d Dept. 1959), aff'd, 7 N.Y.2d 939, 197 N.Y.S.2d 740 (1960). The issue in the cited case was whether a hospital inmate was entitled to a guardian *ad litem* in a suit against the hospital although she had not been declared incompetent to manage her own affairs. The Court of Claims held that she was not so entitled as no committee had been appointed. This order was reversed on the ground that, even if not declared incompetent, the inmate might still need a guardian *ad litem* to represent her in the suit.

Article 5 of the Mental Hygiene Law relating to hospitalization of the mentally ill was revised in 1964. Without considering whether this revision introduced changes as to the findings necessary for commitment, it is apparent that the revision is not applicable to plaintiff's 1951 commitment proceedings.

[14] See *Specht* v. *Patterson,* 386 U.S. 605 (1967); *United States ex rel. Carroll* v. *McNeill,* 294 F.2d 117 (2 Cir. 1961), vacated as moot, 369 U.S. 149 (1962); *Watson* v. *Cameron,* 312 F.2d 878 (D.C. Cir. 1962) (Burger, *J.*,). *In re Buttonow,* 23 N.Y.2d 385, 297 N.Y.S.2d 97 (1968). These cases deal with the need for procedural safeguards where findings, not made in an initial proceeding, are the grounds upon which are based the continued or differential confinement of already confined mentally ill patients.

§ 102,[15] we do indicate that we find the issues rather troublesome.

Plaintiff also contends that class action relief is appropriate. However, as plaintiff's own brief recognizes, members of the purported class may have experienced different treatment from that which plaintiff experienced relative to notice and the opportunity for a hearing in the appointment proceedings. Because of the possible variance in factual situations, it may well be that § 102 is unconstitutional as applied to certain members of the purported class and yet may be constitutional as applied to others.[16] Where such a line could be drawn is not readily apparent, and it would be much more appropriate to handle difficult constitutional questions arising from the application of the statute to varying fact-patterns on a case-by-case basis rather than in a class action. Therefore, we conclude that the class action must fail and that the motion to intervene by Escariz could have been properly denied.

Inasmuch as class action relief is inappropriate, plaintiff must rely upon her own standing to seek injunctive relief in order to support her motion for the convening of a three-judge district court. At the time that this action was commenced plaintiff's committee had already ceased all active control over plaintiff's assets and all that remained before a discharge of the committee was the approval of a final accounting in a state court. Since the

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[15] Likewise, since further proceedings will be had below, we do not now consider plaintiff's equal protection and right to privacy contentions. *Fort* v. *Daley*, 431 F.2d 1128, 1131-1132 (7 Cir. 1970).

[16] Of course, variances in applicability would not defeat the requirement of a constitutional challenge to the statute necessary for the convening of a three-judge court. See *Turner* v. *Fouche*, 90 S. Ct. 532, 536 n. 10 (1970).

filing of this action, the final accounting has been approved and the committee has been discharged. Thus it appears that plaintiff no longer has standing to obtain injunctive relief. While we are mindful that a single judge cannot go beyond the pleadings in deciding whether injunctive relief is appropriate,[17] we appreciate that there is an obvious lack of judicial economy when specially constituted three-judge courts are needlessly convened. We deem the single judge's role in determining whether the prerequisites for a three-judge court are met to be a judicial, and not merely a ministerial, one.[18] Therefore, without passing on the question of whether plaintiff had standing for injunctive relief at the commencement of this action, we do not hesitate to hold that now a three-judge district court is not needed in this case.

The judgment of dismissal is reversed and the case is remanded for further proceedings consistent with this opinion. The denial of the motion for a three-judge court is affirmed.

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[17] *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713, 715 (1962); *Reed Enterprises* v. *Corcoran*, 354 F.2d 519, 522 (D.C. Cir. 1965); *National Mobilization Com. to End War in Vietnam* v. *Foran*, 411 F.2d 934, 936 (7 Cir. 1969); see footnote 11 *supra* and cases cited therein.

[18] *Heaney* v. *Allen*, 425 F.2d 869, 871-872 (2 Cir. 1970); *Majuri* v. *United States*, 431 F.2d 469 (3 Cir. 1970); *Merced Rosa* v. *Herrero*, 423 F.2d 591, 592 n. 1 (1 Cir. 1970); contra *Jackson* v. *Choate*, 404 F.2d 910 (5 Cir. 1968).

LUMBARD, *Chief Judge* (concurring in part and dissenting in part):

Although I agree with the majority that Dale's arguments do raise substantial constitutional questions, I would nevertheless affirm the district court's dismissal of the complaint.

I disagree with the majority that the district court erred in holding that Dale's claim for relief stated no cause of action under the Civil Rights Act. Dale's claim was brought under 42 U.S.C. § 1983 for the deprivation of rights secured to her by the Fourteenth Amendment, and jurisdiction was based on the Civil Rights jurisdictional statute, 28 U.S.C. § 1343(3) and (4). For many years it has been settled that a suit brought under these sections can be entertained in federal court only when it alleges the infringement of a personal right incapable of pecuniary evaluation, and not when it alleges the invasion or deprivation of a property right. E.g., *Holt* v. *Indiana Mfg. Co.*, 176 U.S. 68 (1900); *Hague* v. *C. I. O.*, 307 U.S. 496 (1939) (Stone, *J.*, concurring); *Eisen* v. *Eastman*, 421 F.2d 560 (2d Cir. 1969). In the instant case, Dale alleges that the appointment of the committee pursuant to § 102 deprived her of her property and the right to control that property, without due process of law. Since she thus alleges the infringement of pure property rights, her claim does not state a cause of action under § 1983 and § 1343(3) and (4).

The majority seem to feel that the rights allegedly infringed here are indeed personal civil rights incapable of pecuniary evaluation and that hence Dale has stated a cause of action under § 1983. They cite as such personal civil rights Dale's "right to enter into legal relations, to control and dispose of property, to enter into contracts, and to sue and be sued"—all of which are "incidents of being a competent individual" and all of which "are lost

when one is declared incompetent." I disagree. The alleged infringement of even these rights derived from and depended upon the taking away of her property; and we have clearly stated that when "the loss of freedom derives from and is dependent for its exercise upon the infringement of the property right the action is not within the jurisdiction of § 1983." *Bradford Audio Corp.* v. *Pious*, 392 F.2d 67, 72 (2d Cir. 1968). As in *Bradford*, the freedom here "can only be claimed to be impaired or lost when there has been an infringement of a property right—in this case the alleged unlawful seizure of the money." *Id.*

I do believe, however, that in certain very limited types of cases the deprivation of property rights will give rise to a cause of action under the Civil Rights Act. One such class of cases is that involving welfare recipients, where the property taken away is the sole means of living for the plaintiffs. See *Johnson* v. *Harder*, —— F.2d —— (2d Cir. decided February 9, 1971). But in the instant case, there are no such special circumstances. Hence, Dale's suit falls squarely within the "property rights" limitation on actions brought under § 1983 and § 1343(3); and consequently I feel that the district court was quite correct in dismissing Dale's complaint for lack of jurisdiction.

I concur in the majority's denial of the motion to convene a three-judge court, for, as my brothers recognize, Dale no longer has any basis for injunctive relief for herself and a class action is clearly inappropriate. Indeed, although the majority declined to pass on this question, I believe that Dale had no basis for injunctive relief on the date when she brought suit—August 11, 1969—and thus at that time she could hardly have represented any class who could have alleged a basis for such relief.

Appendix "H"

Affidavit of Service Upon Respondent.

SUPREME COURT: BRONX COUNTY

In the Matter of the Appointment of a Committee of the Person and Property of RITA HOOPER DALE

An Alleged Incompetent Person.

STATE OF NEW YORK } ss.:
COUNTY OF DUTCHESS }

JOHN C. MILLER, being duly sworn deposes and says:

That he is over 21 years of age, and resides at Wingdale, New York

That on the 22nd day of June, 1962, at the Harlem Valley State Hospital in said County, deponent personally served a copy of the annexed Petition and Notice of Motion on Dr. Lawrence P. Roberts, Director of said hospital, and on Rita Hooper Dale an inmate of said hospital, by delivering to and leaving with each of them personally true copies thereof.

That deponent knew the persons so served to be the same individuals mentioned in and to whom said Notice of Motion was directed.

Sworn to before me this
22nd day of June 1962.

LUCY C. CUTOLO
Notary Public
State of New York
Residing Dutchess County
Commission Expires 3/30/65

(SEAL)

JOHN C. MILLER

Appendix "I"

Court of Appeals Order Denying Rehearing.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

RITA HOOPER DALE, a former incompetent person,

Plaintiff-Appellant,

v.

DEMAREST J. HAHN, as committee of the Person and property of Rita Hooper Dale, for the period of July 24, 1962 until April 10, 1967, et al.,

Defendants-Appellees,

ANTONIO ESCARIZ, Applicant for Intervention,

Appellant.

A petition for a rehearing having been filed herein by counsel for appellees Alan D. Miller, M.D., and Lawrence P. Roberts, M.D.,

Upon consideration thereof, it is

ORDERED that said petition be and it hereby is denied.

The case has been remanded to the district court and the contentions of appellee Miller that he cannot be personally liable as he was not the Commissioner of the Department of Mental Hygiene at the time of the original petition, a contention now raised for the first time, must first be ruled upon by the district court upon an enlarged

record, for it may be that the appointment of the successor committee is a basis for his liability. Likewise, the new claim that the state court accounting, which was completed subsequent to the proceedings appealed from, is now *res judicata* must first be resolved below upon the enlarged record.

As to the attacks upon federal jurisdiction we adhere to our conclusions that district court jurisdiction is proper under the Civil Rights Act, and that plaintiff Dale, an alleged incompetent *at the time of the appointment* of the committee, may have been entitled to more than mere notice of the appointment proceedings.

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STERRY R. WATERMAN

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ROBERT C. ANDERSON

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Circuit Judges

I vote to grant and to affirm the judgment of the District Court for the reasons stated in my dissenting opinion.

J. EDWARD LUMBARD

Chief Judge